CUPE·SCFP | Canadian Union of Public Employees
Syndicat canadien de la fonction publique

BRITISH COLUMBIA REGIONAL OFFICE
6222 Willingdon Avenue, Burnaby, BC V5H 0G3
Tel.: (604) 291-1940 Fax: (604) 291-1194 / cupe.ca / scfp.ca

September 23, 2019 **Sent Via Email: policy@worksafebc.com**

Ms. Willa Duplantis
Senior Policy and Legal Advisor
Policy and Regulation Division
WorkSafeBC
P.O. Box 5350, Stn. Terminal
Vancouver BC. V6B 5L5

Dear Ms. Duplantis:

Re: WorkSafeBC ("WCB") Consultation
Evidence and Decision Making
Proposed Policy Amendments
Worker Position – Canadian Union of Public Employees (BC)

I. INTRODUCTION:

I. I. Preamble:

Thank you for requesting stakeholder feedback on the Consultation Discussion Paper, Options and proposed new Policies pertaining to evidence and decision making[1] as per the Petrie Report "Restoring the Balance: A Worker-Centred Approach to Workers' Compensation Policy"[2]. This includes Appendix A of the Consultation (CPR Recommendation #32, Evidence and Decision-Making) and Appendix B.

CUPE (BC) appreciates the opportunity to comment on the Discussion Paper, Options and proposed Policies and Appendices.

[1] WorkSafeBC. See https://www.worksafebc.com/en/law-policy/public-hearings-consultations/current-public-hearings-and-consultations/proposed-evidence-decision-making-policy-amendments
[2] See https://www.worksafebc.com/en/resources/about-us/reports/restoring-balance-worker-centered-approach?lang=en

CUPE is Canada's largest Union with over 680,000 members across the country and has more than 70 offices.[3] CUPE represents workers in many sectors including health care, emergency services, education, early learning and childcare, municipalities, social services, libraries, utilities, transportation, airlines and more. There are nearly 97,000 members in over 160 Locals in B.C.[4]

I.II. Overview of CUPE Position and Preliminary Concerns:

The current Consultation must be coordinated with the Patterson system review[5] and any recommended changes must be addressed in the current Consultation. CUPE did not locate any references to specific processes for doing this in the current Consultation.

Subject to the above and to the changes being made by the WCB and the provincial government, as per the following submission, CUPE partially and tentatively agrees to the following Options in the current Consultation:

- 1B;
- 2B;
- 3B;
- 4B;
- 5B; and,
- 6B.

CUPE disagrees with Options 7A and 7B.

CUPE does not agree with portions of Appendix B and related Policy that pertain to mental disorders, including any applicable legislation and WCB Practice Directives,[6] for example:

- Page 25, (1), (b);
- Page 25, (2);
- Page 26, second bullet;
- Page 26, (3);
- Page 27, A. Does the worker have a DSM diagnosed mental disorder?;

[3] See https://cupe.ca/
[4] See https://www.cupe.bc.ca/
[5] BC Gov News. See https://news.gov.bc.ca/releases/2019LBR0003-000557
[6] All Practice Directives. https://www.worksafebc.com/en/law-policy/claims-rehabilitation/practice-directives

- Page 29, (ii);
- Page 33, (1), (b);
- Page 34, (2); and
- Page 34, (3).

CUPE also has similar issues with respect to the application of the above to Chronic Pain and occupational diseases in general.

I.II.I. Mental Disorders:

CUPE does not agree with portions of Appendix B and related Policy that pertain to mental disorders, including any applicable legislation and WCB Practice Directives,[7] for example:

- Page 25, (1), (b);
- Page 25, (2);
- Page 26, second bullet;
- Page 26, (3);
- Page 27, A. Does the worker have a DSM diagnosed mental disorder?;
- Page 29, (ii);
- Page 33, (1), (b);
- Page 34, (2); and
- Page 34, (3).

This is not an exhaustive list. This list includes, in part, the primary issues that have been identified in previous submissions pertaining to mental disorders, namely:

- The "predominant cause" test;
- The requirement for a worker to have evidence and been seen by a psychologist or a psychiatrist;
- The requirement for a DSM diagnosis; and
- The labour relations exclusion.

[7] All Practice Directives. https://www.worksafebc.com/en/law-policy/claims-rehabilitation/practice-directives

In relation to this, CUPE notes that stress (as opposed to DSM diagnoses) has not been addressed and remains outstanding.

I.II.II. Related Policies Require Amendment:

These are in addition to the numerous continuing concerns arising from the 2002 and 2003[8] legislative changes[9] that run counter to merits and justice, as per the previous CUPE submissions on Merits and Justice. The reversal of these changes is required, at minimum.

I.II.III. What Constitutes No Evidence and Application of Insufficient Evidence:

In regard to Options 7A and 7B, there needs to be more elaboration and clarification that subjective evidence is not a form of "no evidence" and that it should not be considered as "no evidence." Clarification on what "insufficient evidence" means is required as well.

I.II.IV. Onus and Burden of Proof – Merits and Justice:

In terms of the evidentiary onus and burden of proof, there must be more than an emphasis on merits and justice – it should be more than just a factor for consideration in adjudication:

> "At issue is whether WorkSafeBC should amend policy to further <u>emphasize</u> the legislative requirement to base decisions on the merits and justice of the case." (Emphasis added)

The Petrie recommendation (#1) was for more than an "emphasis" on the legislative requirement to base decisions on the merits and justice of a case. The merits and justice should be the only consideration. The WCB has also consistently misread and misapplied Sections 99 and 250 of the *Act* since Bill 63[10] was passed.

Related to this is the application of de minimis and causative significance by the WCB on page 11 of the current Consultation (see page 16 of the Consultation as well). The WCB stated that:

> "Policy states the test for causation for personal injury or death is causative significance, which means the worker's employment must be more than a trivial or insignificant aspect of the injury or death. The same test applies to occupational disease, but the test is not explicitly set out in policy."

The WCB may have merged the two principles. As per several decisions:

> WCAT-2010-01448 – Causation and de minimis:

---

[8] *Workers Compensation Act* in 2002 - Bills 49 and 63, the *Workers Compensation Amendment Act* (No. 1 and No. 2). See http://www.bclaws.ca/civix/document/id/lc/billsprevious/3rd37th:gov49-1 and http://www.bclaws.ca/civix/document/id/lc/billsprevious/3rd37th:gov63-1

[9] Changes to the BC Worker's Compensation System 2002 – 2003 The Impact on Injured Workers Adding Insult to Injury. See https://bcfed.ca/sites/default/files/attachments/1520-09br-Insult%20to%20Injury.pdf

[10] BILL 63 – 2002, *WORKERS COMPENSATION AMENDMENT ACT* (No. 2), 2002. See http://www.bclaws.ca/civix/document/id/lc/billsprevious/3rd37th:gov63-1

A WCAT panel in 2010 (WCAT-2010-01448) considered policy item #22.00 and in its finding provided an extensive analysis relating to "the test for causation". After referring to a number or prior WCAT findings, one of which referred to the Supreme Court of Canada decision in Athey v. Leonati and another to the BC Supreme Court case in Schulmeister v. BC (WCAT), at paragraph [132], the panel concluded it is sufficient to establish workers' compensation entitlement if the injury was a significant contributing factor, or contributed to a material degree to the disablement. It is not necessary that the employment be the sole cause, the predominant cause or even the major cause, in order to establish employment causation. Even if other personal or non-work factors played a role, this does not preclude consideration as to whether the work injury was also of causative significance. It is sufficient that the employment was of some causative significance which was more than negligible or trifling (de minimis) in nature.

WCAT Decision Number: WCAT-2010-01815 – de minimis:

WCAT Decision Date: June 30, 2010
Panel: Rob Kyle, Vice Chair

[88] In a leading case from the Supreme Court of Canada on causation of personal injury (Athey v. Leonati, [1996] 3 S.C.R. 458), the Court stated:

...the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury: Myers v. Peel County Board of Education; [1981] 2 S.C.R. 21, Bonnington Castings, Ltd. v. Wardlaw, [1956] 1 All E.R. 615 (H.L.); McGhee v. National Coal Board, supra. A contributing factor is material if it falls outside the de minimis range: Bonnington Castings, Ltd. v. Wardlaw, supra; see also R. v. Pinske (1988), 30 B.C.L.R. (2nd) 114 (B.C.C.A.), aff'd [1989] 2 S.C.R. 979. [Emphasis added]

[89] I accept "significant contributing factor" or "causally significant" as both analogous in meaning to "materially contributed."

[90] "De minimis" is the shortened version of the legal maxim "de minimis non curat lex", defined in the Dictionary of Canadian Law, 2nd edition, as "The law does not bother itself about trifles." Black's Law Dictionary expands on that definition in defining "de minimis" as "so insignificant that a court may overlook it in deciding an issue or case."

Was this the intent of the WCB? CUPE asserts that de minimis is the test that must be applied for causative significance (but subject to and subordinate to the merits and justice of the claim).

I.II.V. Definition of Decision:

This is an issue from previous Consultations and an issue for the current Consultation. Many workers have expressed frustration and confusion over what is a decision. For example, is correspondence regarding limitations and restrictions a decision? The WCB has stated that it is not. CUPE disagrees, especially with respect to Options 4, 6 and 7.

As per paragraph 53 of WCAT Noteworthy decision WCAT-2009-00149 dated January 16, 2009:[11]

> "In WCAT Decision #2006–02669, a panel reviewed the outcome of WCAT Decision #2006–02121. The panel concluded that a decision is not made until the Board issues a decision via a letter or an oral communication. There is no requirement that the decision be issued in writing to be effective."[12] (Emphasis added)

This was echoed on WCAT Noteworthy decision WCAT-2012-00357 dated February 07, 2012.[13] However, the communications regarding such matters as limitations, restrictions and capabilities has never been properly addressed.

I.II.VI. Applicable Policies, Practice Directives, Forms and Other WCB Materials:

Any applicable Practice Directives and WCB materials e.g. forms, templates, etc such as the mental disorder questionnaire,[14] as well as various webpages,[15] Fact Sheets,[16] etc. will need to be revised and distributed to stakeholders for a Consultation. As one small example of items that need to be revised, Sections 96 and 99 of the *Act* direct that the WCB to undertake investigations to determine benefit entitlement.[17] Sections 5(4), 5(5), 5.1, 6, 6.1, 7, 8, 16, 17, 21, 22, 23, 24, 29, 30, and 32 indirectly refer to or infer this mandate. Policy directs that the WCB operates under an inquiry system and gathers evidence to adjudicate claims as per Policy item 97.00, Evidence, of the RSCM II, as opposed to perfunctory adherence to Policy.

I.II.VII. Jurisdiction and Procedures of the Review Division and Workers' Compensation Appeal Tribunal Require Amendment:

The jurisdiction and operating procedures of the Review Division[18] and the Workers' Compensation Appeal Tribunal ("WCAT")[19] need to be reviewed and revised as required based upon the changes in Options and Issues 1 to 7.

---

[11] See http://www.wcat.bc.ca/research/decisions/pdf/2009/01/2009-00149.pdf
[12] CUPE has expressed concerns in the past regarding this issue. Many verbal decisions are not appealed due to worker confusion, literacy issues, English as a second language issues, pain, etc.
[13] See http://www.wcat.bc.ca/research/decisions/pdf/2012/02/2012-00357.pdf
[14] WorkSafeBC. Example. Form 10D90 or its replacement.
[15] WorkSafeBC. Example. Mental health disorders. See https://www.worksafebc.com/en/claims/report-workplace-injury-illness/types-of-claims/mental-health-disorders
[16] WorkSafeBC. Example. CM089 R08/19. Frequently asked questions. Mental disorder claims. See https://www.worksafebc.com/en/resources/health-care-providers/guides/frequently-asked-questions-mental-disorder-claims?lang=en
[17] WCAT-2003-03300-RB.
[18] See https://www.worksafebc.com/en/review-appeal
[19] See http://www.wcat.bc.ca/research/MRPP/

I.III. Issues from Previous Submissions Not Fully Addressed:

I.III.I. Merits and Justice – Issues from Consultation Not Fully Addressed:

CUPE previously disagreed with the phraseology "in accordance with" in per previous Consultations. The merits and justice of the case/claim are foundational as opposed to just another contextual consideration. There must be more than a mere "emphasis" on merits and justice. The *Act* must be the starting point, as opposed to being subordinate to Policy. Section 99(1) states that "(1)The Board may consider all questions of fact and law arising in a case". Policy is not law. The WCB must base their decisions, including non-appealable decisions, on the merits and justice of the case[20] (claim). The current Consultation does not completely adhere to the Petrie recommendations[21] and many court cases that speak to merits and justice. It appears to be a piecemeal approach.

II. BACKGROUND TO CONSULTATION:

As per the website:[22]

> "In January 2018, WorkSafeBC's Board of Directors commissioned an external compensation policy review. The resulting report entitled *Restoring the Balance: A Worker-Centred Approach to Workers' Compensation Policy* was published April 2018 and contains a number of recommendations. Recommendation #32 is for WorkSafeBC to consider incorporating the principles regarding standard of proof and medical evidence from recent judicial decisions into policy."

The foundation for the current Consultation is the Compensation Policy Review, *Restoring the Balance: A Worker-Centred Approach to Workers' Compensation Policy* ("CPR") contains a number of recommendations. These were referred to in the previous Merits and Justice Consultation, where it was stated, in part, that:

> "CPR recommendation #1 is to amend policy to explicitly incorporate the requirement WorkSafeBC "must make its decision based on the merits and justice of the case" as required by the *Workers Compensation Act* ("*Act*"). According to the CPR, this amendment would allow for an adequate investigation of the relevant facts and circumstances, taking into consideration the evidence of the worker in all cases.
>
> Section 99(2) of the *Act* requires WorkSafeBC to "make its decisions based upon the merits and justice of the case, but in so doing [WorkSafeBC] must apply a policy of the Board of Directors that is applicable in that case". Currently, policy quotes that section of the *Act* and discusses the merits and justice requirement but does not otherwise use the phrase "merits and justice".

[20] The WCB used the term "case" which is not used in the *Act* or Policy. Is this a substantial change being contemplated?
[21] Paul Petrie. *Restoring the Balance: A Worker-Centred Approach to Workers' Compensation Policy* March 31, 2018. See https://www.worksafebc.com/en/about-us/news-events/announcements/2018/April/update-review-rehabilitation-claims-policies
[22] WorkSafeBC. Consultations. See https://www.worksafebc.com/en/law-policy/public-hearings-consultations/current-public-hearings-and-consultations/proposed-evidence-decision-making-policy-amendments

At issue is whether WorkSafeBC should amend policy to further emphasize the legislative requirement to base decisions on the merits and justice of the case."[23]

III. PROPOSED CONSULTATION DISCUSSION PAPER OPTIONS:

III.I. Options:

As per the seven issues identified under Section 7.1 Relevant Legal Principles, and Section 8 "OPTIONS AND IMPLICATIONS" of the Consultation Discussion Paper, there were 14, under seven categories, options provided to stakeholders for feedback.

These include:

"Issue 1: The evenly weighted standard of proof under the Act is distinct from the civil balance of probabilities standard

Option 1A: Status quo

Under this option, no amendments to policy in the RS&CM would be made relating to Issue 1.

Implications

- In some instances, policy would not entirely reflect the legal principles stated in Fraser Health in regards to distinguishing the standard of proof under Section 99(3) from the balance of probabilities standard.

- CPR recommendation #32 would not be addressed in relation to Issue 1.

Option 1B:

Under this option, policy in the RS&CM would be amended to state: for decisions respecting compensation or rehabilitation of a worker, the standard of proof under Section 99(3) is "at least as likely as not"; and the standard of proof to rebut the Act's presumptions is balance of probabilities, which means "more likely than not." Policy would also be amended to ensure it is consistent with the applicable standard of proof.

Implications

- The legal principles stated in Fraser Health in regard to distinguishing the standard of proof under Section 99(3) from the balance of probabilities standard would be reflected in policy.

- Decision-makers considering the applicable standard of proof would have the benefit of additional policy guidance.

- CPR recommendation #32 would be addressed in relation to Issue 1.

[23] Section 82 of the *Act*. See http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/96492_01#section87

Issue 2: The standard of proof under the *Act* is distinct from medical or scientific standards of certainty

Option 2A: Status quo

Under this option, no amendments to policy in the RS&CM would be made relating to Issue 2.

Implications

- Policy would not explicitly state applicable legal principles from Fraser Health and McKnight in regard to distinguishing the standard of proof under Section 99(3) from medical and scientific standards of certainty.

- CPR recommendation #32 would not be addressed in relation to Issue 2.

Option 2B:

Under this option, policy in the RS&CM would be amended to state that the standard of proof under the Act is different than medical or scientific standards of certainty, and therefore expert medical evidence is not determinative of the issues of causation or whether a worker suffers from an occupational disease.

Implications

- Legal principles from Fraser Health and McKnight in regard to distinguishing the standard of proof under section 99(3) from medical and scientific standards of certainty would be reflected in policy.

- Decision-makers considering issues of causation and whether a worker suffers from an occupational disease would have the benefit of additional policy guidance.

- CPR recommendation #32 would be addressed in relation to Issue 2.

Issue 3:

Causation can be inferred from evidence other than expert medical evidence, including circumstantial evidence

Option 3A: Status quo

Under this option, no amendments to policy in the RS&CM would be made relating to Issue 3.

Implications

- Policy would not explicitly state applicable legal principles from Fraser Health and Snell in regard to a decision-maker's ability to infer causation from other evidence when scientific or medical proof is lacking, including circumstantial evidence.

- In some instances, policy could be interpreted as suggesting direct evidence of causation is required or only medical evidence can be considered.

- CPR recommendation #32 would not be addressed in relation to Issue 3.

Option 3B:

Under this option, policy in the RS&CM would be amended to state causation can be inferred from evidence other than expert evidence. Policy would also be amended to remove requirements for positive evidence of causation, and to remove suggestions that only medical evidence of causation can be considered.

Implications

- Policy would be consistent with legal principles from Fraser Health and Snell in regard to a decision-maker's ability to infer causation from other evidence when scientific or medical proof is lacking, including circumstantial evidence, and this principle would be reflected in policy.

- Decision-makers considering issues of causation would have the benefit of additional policy guidance.

- CPR recommendation #32 would be addressed in relation to Issue 3.

Issue 4: Providing guidance on the meaning of general evidentiary principles (e.g., standard of proof)

Option 4A: Status quo

Under this option, no amendments to policy in the RS&CM would be made relating to Issue 4.

Implications

- Policy would not be further clarified regarding the meaning of the general evidentiary principles of "standard of proof", "onus" and "burden of proof."

Option 4B:

Under this option, policy in the RS&CM would be amended to explain the meaning of the terms "standard of proof", "onus" and "burden of proof", and provide an example of how the standard of proof applies to the issues in question.

Implications

- Direction from case law in regard to the meaning of general evidentiary principles would be reflected in policy.

- Decision-makers considering general evidentiary principles would have the benefit of additional policy guidance.

Issue 5: Explicitly setting out in policy the test for causation for occupational diseases is causative significance, and ensuring terms used throughout the RS&CM to describe causative significance are used consistently

Option 5A: Status quo

Under this option, no amendments to policy in the RS&CM would be made relating to Issue 5.

Implications

- The test for causation for occupational diseases would continue to be the causative significance test, but this would not be explicit in policy.

- In some instances, in policy, the causative significance test may not be consistently described.

Option 5B: Under this option, policy would be amended to state the test for causation for occupational diseases is causative significance, and to ensure policy throughout the RS&CM uses and describes the causative significance test consistently.

Implications

- The test for causation for occupational diseases would be explicitly set out in policy.

- The causative significance test would be consistently described in policy.

Issue 6: Clarifying decision-makers must consider all types of evidence when assessing whether the evidence is sufficient to meet the standard of proof.

Option 6A: Status quo

Under this option, no amendments to policy in the RS&CM would be made relating to Issue 6.

Implications

- Policy would not be clarified regarding the need for decision-makers to consider and weigh all of the relevant evidence available on a given issue.

Option 6B:

Under this option, where policy could be interpreted as setting out an absolute requirement for objective or independently verifiable evidence, policy would be amended to clarify that the requirement is sufficient evidence.

Implications

- Policy would be clarified that decision-makers must consider all types of evidence when assessing whether the evidence is sufficient to meet the standard of proof.

Issue 7: Explicitly setting out in policy that a rebuttable presumption in the Act is not rebutted based on lack of evidence

Option 7A: Status quo

Under this option, no amendments to policy in the RS&CM would be made relating to Issue 7.

Implications

- Policy would not explicitly state applicable legal principles from the case law in regard to evidence to rebut work causation presumptions.

Option 7B: Under this option, policy concerning the standard of proof for the Act's presumptions in favour of work causation would be amended to state a lack of evidence is not sufficient to rebut the presumption.

Implications

- Legal principles from the case law in regard to evidence to rebut work causation presumptions would be reflected in policy.

- Decision-makers considering whether a work causation presumption is rebutted would have the benefit of additional policy guidance."

IV. ORGANIZATION POSITION:

IV.I. Organization Position:

As stated in Section I., subject to the identified changes being made by the WCB and the provincial government, CUPE partially and tentatively agrees to the following Options in the current Consultation:

- 1B;

- 2B;

- 3B;

- 4B;
- 5B; and,
- 6B.

CUPE disagrees with Options 7A and 7B.

CUPE does not agree with portions of Appendix B and related Policy that pertain to mental disorders, including any applicable legislation and WCB Practice Directives, for example:

- Page 25, (1), (b);
- Page 25, (2);
- Page 26, second bullet;
- Page 26, (3);
- Page 27, A. Does the worker have a DSM diagnosed mental disorder?;
- Page 29, (ii);
- Page 33, (1), (b);
- Page 34, (2); and
- Page 34, (3).

CUPE also has similar issues with respect to the application of the above to Chronic Pain and occupational diseases in general.

V. REASONS FOR ORGANIZATION POSITION:

V.I. Preliminary Concerns and Questions Not Addressed (including several reports, legislation, jurisprudence, and appellate tribunal decisions that have not been considered):

As stated in Section I above, CUPE's preliminary concerns and questions have not been addressed.

V.I.I. Petrie[24] Recommendations – Not Fully Applied to Appendix B:[25]

[24] Paul Petrie *Restoring the Balance: A Worker-Centered Approach to Workers' Compensation Policy.*
[25] See https://www.worksafebc.com/en/resources/about-us/reports/restoring-balance-worker-centeredapproach?lang=en

The Petrie Recommendations have not been applied to all parts of Policy and the Appendices e.g. Appendix B – mental disorders. Petrie states at page 10 of his report, under "A Worker-Centred Approach to Decision Making", that:

> "A worker-centred approach for injured and disabled workers is one that takes into consideration the worker's individual circumstances in applying policy and making decisions about benefit entitlement and rehabilitation measures. It is designed to maximize the worker's recovery from the injury or disease and to restore as close as possible the worker to his pre-injury employment status without a loss of earnings."

Recommendation #1 specifically stated that:

> "I recommend that the Board of Directors consider amending Policy #2.20 to explicitly incorporate the requirement in Section 99(2) that, "the Board must make its decision based on the merits and justice of the case." That amendment 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."

Petrie did not state that this must be subordinate to Policy or that Policy was compulsory. Petrie's rationale for Recommendation #1 is stated at page 11:

> "While the policy still provides for the Board to take into account the relevant facts and circumstances, 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." (Emphasis added)

Petrie also refers to Policy 2.20 as an example of the problem.[26] Policy 2.20 states, in part, that:

> "In making decisions, the Board must take into account all relevant facts and circumstances relating to the case before them. This is required, among other reasons, in order to comply with Section 99(2) of the *Act*. In doing so, the Board must consider the relevant provisions of the *Act*. If there are specific directions in the *Act* that are relevant to those facts and circumstances, the Board is legally bound to follow them.
>
> The Board also must apply a policy of the Board of Directors that is applicable to the case before them. 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." (Emphasis added)

[26] RSCM II. See https://www.worksafebc.com/en/resources/law-policy/rehabilitation-services-and-claims-manual-volume-ii/rehabilitation-services-and-claims-manual-volume-ii/chapter-1?lang=en

Petrie elaborates on this by stating at page 11 that:

> "Prior to 2002 Board policy provided 'adjudicative guidance' and so the individual circumstances – the merits and justice of the case – could provide a basis for exercising a greater degree of discretion."

And,

> "There is no specific reference in Policy #2.20 to the requirement in Section 99 that, 'The Board must make its decision based on the merits and justice of the case.' This provision in the legislation is at the heart of a worker centred approach to the application of policy in a fair and compassionate way that is responsive to the worker's circumstances."

V.II. Reasons Pertaining to Issues and Options 1 to 7:

As stated in Section I above, there are issues that have not been addressed by the Options.

V.II.I. Mental Disorders:

CUPE does not agree with portions of Appendix B and related Policy that pertain to mental disorders, including any applicable legislation and WCB Practice Directives,[27] for example:

- Page 25, (1), (b);
- Page 25, (2);
- Page 26, second bullet;
- Page 26, (3);
- Page 27, A. Does the worker have a DSM diagnosed mental disorder?;
- Page 29, (ii);
- Page 33, (1), (b);
- Page 34, (2); and
- Page 34, (3).

This is not an exhaustive list. This list includes, in part, the primary issues that have been identified in previous submissions pertaining to mental disorders, namely:

- The "predominant cause" test;

[27] All Practice Directives. https://www.worksafebc.com/en/law-policy/claims-rehabilitation/practice-directives

- The requirement for a worker to have evidence and been seen by a psychologist or a psychiatrist;
- The requirement for a DSM diagnosis; and
- The labour relations exclusion.[28]

In terms of the applicable of rebuttable presumption to mental disorder claims and traumatic events, CUPE agrees with previous BC Federation of Labour submissions where it was suggested that the WCB consider language such as:

> "The presumption is rebutted only if there is a preponderance of evidence showing that, on the balance of probabilities, the traumatic event was of no causative significance in producing the mental disorder." (Revised by CUPE)

In relation to this, CUPE notes that stress (as opposed to DSM diagnoses) has not been addressed and remains outstanding.

V.II.II. Related Policies Require Amendment:

These are in addition to the numerous continuing concerns arising from the 2002 and 2003[29] legislative changes[30] that run counter to merits and justice, as per the previous CUPE submissions on Merits and Justice. The reversal of these changes is required, at minimum.

V.II.III. What Constitutes No Evidence and Application of Insufficient Evidence:

In regard to Options 7A and 7B, there needs to be more elaboration and clarification that subjective evidence is not a form of "no evidence" and that it should not be considered as "no evidence."

This overlaps with the issue of what constitutes a decision (see Section V.II.V. below). There is some confusion over what is no evidence and what is insufficient evidence.

As per the BC Federation of Labour, the reference to "insufficient evidence" creates an impression that there is a burden of proof on the worker, which Policy item #97.00 clearly says there is not. As per the BC Federation of Labour Mental Disorder Presumption for First Responders submission dated June 2018:

> "The reference to "insufficient evidence" confuses two concepts in Policy item #97.00:
>
> a. Is the evidence "sufficient" to make a sound decision with confidence; and

[28] WorkSafeBC is conducting a complete review of the violence OHS Regulations. One issue that arose at the pre-consultation meetings in September 2019 was the issue of labour relations exclusions in terms of violence and mental disorders. The same applies to any language regarding interpersonal conflicts.

[29] *Workers Compensation Act* in 2002 - Bills 49 and 63, the *Workers Compensation Amendment Act* (No. 1 and No. 2). See http://www.bclaws.ca/civix/document/id/lc/billsprevious/3rd37th:gov49-1 and http://www.bclaws.ca/civix/document/id/lc/billsprevious/3rd37th:gov63-1

[30] Changes to the BC Worker's Compensation System 2002 – 2003 The Impact on Injured Workers Adding Insult to Injury. See https://bcfed.ca/sites/default/files/attachments/1520-09br-Insult%20to%20Injury.pdf

b. If so, does the evidence favour one view or another on the balance of probabilities.

> If the evidence is "insufficient," the Board cannot simply deny the claim. Rather, Policy item #97.00 says:
>
> The correct approach is to examine the evidence to see whether it is sufficiently complete and reliable to arrive at a sound conclusion with confidence. If not, the Board should consider what other evidence might be obtained, and must take the initiative in seeking further evidence. After that has been done, if, on weighing the available evidence, there is then a preponderance in favour of one view over the other, that is the conclusion that must be reached. But if it appears upon the weighing of the evidence that the disputed possibilities are evenly balanced, then the rule comes into play which requires that the issue be resolved in accordance with that possibility which is favourable to the worker." (Emphasis added)

All language should be congruent with Policy item #97.00.

In support of this CUPE refers to page 10 of the current Consultation.

> "Additionally, because Fraser Health said causation can be inferred from circumstantial evidence, the PRRD is proposing to amend policy to remove requirements for "positive evidence" of causation. In law, "positive" evidence is generally understood as meaning "direct evidence" (i.e., not circumstantial evidence). So, policy requiring "positive evidence" of causation could be interpreted as not permitting consideration of circumstantial evidence, which is inconsistent with Fraser Health."

V.II.IV. Onus and Burden of Proof – Merits and Justice:

In terms of the evidentiary onus and burden of proof, there must be more than an emphasis on merits and justice – it should be more than just a factor for consideration in adjudication – especially in mental disorder and occupational disease claims. The WCB had stated in another Consultation (Merits and Justice) that:

> "At issue is whether WorkSafeBC should amend policy to further emphasize the legislative requirement to base decisions on the merits and justice of the case." (Emphasis added)

The Petrie recommendation (#1) was for more than an "emphasis" on the legislative requirement to base decisions on the merits and justice of a case. The merits and justice should be the only consideration.

The WCB has also consistently misread and misapplied Sections 99 and 250 of the *Act* since Bill 63[31] was passed. This is very important for highly complex claims such as mental disorder claims.

[31] BILL 63 – 2002, *WORKERS COMPENSATION AMENDMENT ACT* (No. 2), 2002.
See http://www.bclaws.ca/civix/document/id/lc/billsprevious/3rd37th:gov63-1

V.II.V. Definition of Decision:

This is an issue from previous Consultations and an issue for the current Consultation. Many workers have expressed frustration and confusion over what is a decision. For example, is correspondence regarding limitations and restrictions a decision? The WCB has stated that it is not. This is an issue, especially with respect to Options 4, 6 and 7.

As per paragraph 53 of WCAT Noteworthy decision WCAT-2009-00149 dated January 16, 2009:[32]

> "In WCAT Decision #2006–02669, a panel reviewed the outcome of WCAT Decision #2006–02121. The panel concluded that a decision is not made until the Board issues a decision via a letter or an oral communication. There is no requirement that the decision be issued in writing to be effective."[33] (Emphasis added)

This was echoed on WCAT Noteworthy decision WCAT-2012-00357 dated February 07, 2012.[34] However, the communications regarding such matters as limitations, restrictions and capabilities has never been properly addressed. This affects the ability of workers to appeal these types of communications as they are not deemed to be decisions. It also affects disability awards, Vocational Rehabilitation decisions, etc.

V.II.VI. Applicable Policies, Practice Directives, Forms and Other WCB Materials:

Any applicable Practice Directives and WCB materials e.g. forms, templates, etc. such as the mental disorder questionnaire,[35] as well as various webpages,[36] Fact Sheets,[37] etc. will need to be revised and distributed to stakeholders for a Consultation.

As one small example of items that need to be revised, Sections 96 and 99 of the *Act* direct that the WCB to undertake investigations to determine benefit entitlement.[38]

Sections 5(4), 5(5), 5.1, 6, 6.1, 7, 8, 16, 17, 21, 22, 23, 24, 29, 30, and 32 indirectly refer to or infer this mandate.

Policy directs that the WCB operates under an inquiry system and gathers evidence to adjudicate claims as per Policy item 97.00, Evidence, of the RSCM II, as opposed to perfunctory adherence to Policy.

V.II.VII. Jurisdiction and Procedures of the Review Division and Workers' Compensation Appeal Tribunal Require Amendment:

---

[32] See http://www.wcat.bc.ca/research/decisions/pdf/2009/01/2009-00149.pdf

[33] CUPE has expressed concerns in the past regarding this issue. Many verbal decisions are not appealed due to worker confusion, literacy issues, English as a second language issues, pain, etc.

[34] See http://www.wcat.bc.ca/research/decisions/pdf/2012/02/2012-00357.pdf

[35] WorkSafeBC. Example. Form 10D90 or its replacement.

[36] WorkSafeBC. Example. Mental health disorders. See https://www.worksafebc.com/en/claims/report-workplace-injury-illness/types-of-claims/mental-health-disorders

[37] WorkSafeBC. Example. CM089 R08/19. Frequently asked questions. Mental disorder claims. See https://www.worksafebc.com/en/resources/health-care-providers/guides/frequently-asked-questions-mental-disorder-claims?lang=en

[38] WCAT-2003-03300-RB.

The jurisdiction and operating procedures of the Review Division[39] and the Workers' Compensation Appeal Tribunal ("WCAT")[40] need to be reviewed and revised as required based upon the changes in Options and Issues 1 to 7.

VI. CONCLUSION:

The current Consultation Discussion Paper, Options and proposed Policies partially address the concerns noted in this submission. CUPE is pleased to see the WCB progress on so many issues so quickly. There is a need for movement on several key areas of Policy and the Appendix B that affect some of the most vulnerable workers in BC. This includes mental disorders and occupational diseases. CUPE believes that a number of Policies and tests set out for mental disorder Policies and Practice Directives are not supported by law and subject to judicial review.

Related legislation, Policy, Practice Directives, appellate tribunal policies and procedures, etc. must be changed to reflect this.

CUPE reserves the right to comment on how these changes apply to the OHS Regulations, related Policies, the *Act*, Policy (RSCM) and the Practice Directives.

Respectfully submitted,

Tom McKenna
CUPE National Health & Safety Representative

cc: Paul Faoro, President, CUPE BC Division
Trevor Davies, Secretary-Treasurer, CUPE BC Division
Meena Brisard, BC. Regional Director
Archana Rampure, CUPE National Director, Research, Job Evaluation and Health and Safety
Rob Jandric, BC. Acting Regional Director
Troy Winters, CUPE National Senior Officer, Health and Safety Representative

cope491
tm/jd
Reps_T-McKenna_Submissions_2019_Consultation-Evidence-and-Decision-Making-Policy-Amendments_09-23-2019

[39] See https://www.worksafebc.com/en/review-appeal
[40] See http://www.wcat.bc.ca/research/MRPP/