BC NURSES' UNION
Standing up for health care

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Sent via Email: policy@worksafebc.com

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Dear Ms. Fournier:

Re: Discussion Paper: Mental Disorder Policy Review

Thank you for the opportunity to comment on the above noted Discussion Paper. The BC Nurses' Union represents more than 48,000 members in the British Columbia healthcare industry. As the unified voice of nurses working in healthcare, significant weight should be attached to our position and recommendations on this issue.

Issue

The June 26, 2023 Discussion Paper *Mental Disorder Policy* provides options for amendments to compensation policy for mental disorders. The options provided in the Discussion Paper are,

Options and Implications

Issue #1: Definition of Significant Work-Related Stressor

Option 1A: Status quo

Under this option, no policy changes would be made.

Implications

- The definition of significant work-related stressor would continue to include a comparison to normal pressures and tensions of the worker's employment.
- CPR recommendation #39 regarding the definition of significant work-related stressor would not be addressed.

Option 1B: Amend Definition of "Significant Work-Related Stressor"

Under this option, the definition would be amended and policy would be clarified, as set out in **Appendix A.**

Implications

- The definition of significant work-related stressor would include a comparison to normal pressures and tensions of employment generally, rather than a comparison to a worker's specific employment.

- As the proposed changes align with current decision-making practices, CRS anticipates any cost implications to be minimal.

- Policy's requirement to apply a subjective and objective analysis to the question of whether an event is traumatic or a work-related stressor significant would be clarified.

- CPR recommendation #39 regarding the definition of significant work-related stressor would be addressed.

Issue #2: Labour Relations Exclusion

Option 2A: Status quo

Under this option, no policy changes would be made.

Implications

- Decision-makers would continue to apply guidance from appellate bodies and practice regarding limits to the labour relations exclusion.

- Policy would not provide additional guidance.

- CPR recommendation #40 would not be addressed.

Option 2B: Amend Policy to Add Guidance for Labour Relations Exclusion

Under this option, policy would be amended to add guidance as set out in Appendix A.

Implications

- Policy would define the purpose and intent of the labour relations exclusion.
- Guidance on what is considered an employer decision would be provided.
- Guidance from appellate bodies and practice regarding limits to the labour relations exclusion would be incorporated into policy.
- CRS anticipates an increase in the number of claims filed and accepted that relate to significant work-related stressors.
- CPR recommendation #40 would be addressed.

Background

Mental Disorders that are psychological injury only (not a compensable consequence of a different initial injury) affect nurses more than any other occupation. The voice of nurses should be given considerable weight on Mental Disorder policy.

There have been improvements in Mental Disorder claim adjudication that have been driven in large part by new claim review/appeal decisions more than policy changes. The current policy change proposals are influenced by changes to the envelope for compensable mental disorders that are a result of review/appeal decisions. Some of the most significant of these decisions that influence the changes have been the result of advocacy for BCNU members. A very large proportion of mental disorder claims arise from healthcare and of those a very large proportion involve nurses.

Two prominent decisions on the mental disorder issues are R0247622 and R0300283 both Review Division decision for BCNU members represented by the BCNU. The first of these two decisions May 25, 2022 found the nurse was subjected to excessive workload for an extended period of time. The excessive workload was found to be a

significant mental stressor. The decision also found that excessive workloads were not exempted as decisions of the employer regarding the employment. Since that first decision noted, there have been several others that have followed this pattern of recognizing excessive workload as a significant stressor and limiting the scope of the employer decision exemption.

The second decision R0300283 cited above was made May 12, 2023. This decision recognized that responsibilities to deal with COVID community nursing relations, including hostile public reactions, were significant stressors that also were not exempted as decisions of the employer.

Proposed Policy Changes

The current policy states,

> A work-related stressor is considered "significant" when it is excessive in intensity and/or duration from what is experienced in the normal pressures or tensions of a worker's employment.

This would remain in the policy description of a significant stressor with the deletion of "a worker's". There would also be the following addition,

> The Board recognizes that workers may, due to the nature of their work, be exposed to traumatic events or significant work-related stressors as part of their employment. An event may be traumatic or a work-related stressor significant even though the worker has previous work-related exposure to traumatic events or significant stressors.
>
> In determining whether an event is traumatic or a work-related stressor is significant, the worker's subjective statements and response to the event or work-related stressor are considered. However, this question is not determined solely by the worker's subjective belief about the event or work-related stressor. It involves an analysis of both subjective and objective factors. **The Board considers whether a reasonable person, in the worker's situation and with the general characteristics of the worker, would expect to find the event traumatic or the work-related stressor significant.**
> (emphasis added)

The crux of the matter would then become whether the workers experience of the stressor is what would be expected or experienced by a reasonable person would find the event traumatic or a work-related significant stressor. This becomes a very subjective standard. It is appropriate that how a worker would experience the event is addressed subjectively. Whether the event occurred and the details of the event are matters to be determined objectively. How a worker experiences the event(s) is something to be determined subjectively. This subjective determination needs to be analyzed by factors that include how a reasonable worker would experience such an event; how the worker that experienced the event reacted to this and the professional opinion on the etiology and factors precipitating or maintaining a diagnosed DSM condition. This is not an exclusive list of factors. It is an example of some of the factors that should be considered.

The proposed language on how a reasonable person in the worker's situation, and with the general characteristics of the worker, should not be included in the new policy because it requires the decision maker to make extremely subjective findings on how they believe a "reasonable" person would expect to find the event. This presumed "reasonable person" is not necessarily a person that directly experiences the event. There is an extremely broad range of reactions that could be considered reasonable. When does a person, or how a person would find an event, cross a threshold of being unreasonable?

One of the most eloquent and well-reasoned decisions in the BC Worker's Compensation system is Appeal Division Decision 92-1386 by Chief Appeal Commissioner Connie Munro. This decision is on proportionate entitlement but there are several very insightful passages including the following on making conclusions on matters with limited or subjective facts,

> It seems to me that if the theory of apportionment is to be applied to cases of activation and acceleration, doctors would be called on to perform feats of medical magic and they and the Board to make computations of mathematical wizardry. It is my opinion that in such cases compensation should be payable for the whole of the disability precipitated by the industrial injury. If it were to be otherwise, I feel the Board doctors would be driven to making decisions based not on judgment, but on guesswork. The justice to workmen and employers resulting would be altogether too rough for my liking.

It seems to us that deciding how a "reasonable person" would experience traumatic events would lead to "guesswork" on the part of the decision maker. If this "reasonable person" criteria is placed in policy it becomes binding upon the initial decision makers, the Review Division and the appeal tribunal as a result of the binding nature of policy. We are concerned that the guesswork involved in determining what a theoretical reasonable person would do would also be all too rough.

Instead of using the "reasonable person" criteria the test should focus on whether the worker experienced the event(s) as traumatic or significant stressors. As we have noted above there is evidence to consider on how the worker experienced the events whereas how a theoretical "reasonable person" experiences the events is based primarily on the speculative conceptions of the decision maker. The decision maker should weigh the evidence on whether the worker experienced the objective events as traumatic or significant stressors and then make a determination based on the merits and justice of the case whether it was reasonable for the worker in question to have experienced the events in this manner. The law and policy requires that sufficient evidence be gathered to make a sound decision with confidence and that the decision be based on the merits and justice of the case. In our view it is unnecessary and problematic to add the language on "reasonable person" to the mental disorder policy.

On the Labour Relations Exclusions, the CPS (Petrie Report) had recommended a requirement that the worker's reaction must be the result of a specific employer decision regarding the employment. The proposed policy change to the contrary says that decisions of the employer are not limited to specific decision. The proposed additions to the policy are in yellow in the section below.

> E. Section 135(1)(c) Labour Relations Exclusions
>
> Section 135(1)(c) provides ~~T~~there is no entitlement to compensation if the mental disorder is caused by a decision of the worker's employer relating to the worker's employment. This exclusion is to ensure employers remain able to manage their workplaces and workers in an effective manner and acknowledges the often unavoidable and inherent nature of stress arising from normal pressures and tensions at work.
>
> Decisions of the employer are not limited to specific decisions and include circumstances related to the worker's employment over which the employer has control.
> The Act provides a list of examples of decisions relating to a worker's employment which include a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment. This statutory list of examples is inclusive and not exclusive.
>
> Other examples may include decisions of the employer relating to workload and deadlines, work evaluation, performance management, transfers, changes in job duties,

lay-offs, demotions and reorganizations.

The exclusion is not absolute.

The exclusion does not apply to decisions which are made or performed in bad faith. For the purpose of this policy, bad faith means improper purpose or ulterior motive, or a misuse of managerial authority, that does not serve a legitimate workplace purpose. Bad faith is not simply bad judgment or negligence. To be bad faith the conduct must be egregious. Similarly, the exclusion does not apply to management decisions communicated to the worker in an abusive or threatening manner.

Decisions relating to workload typically fall under the exclusion. However, the exclusion may not apply to employer decisions which result in an unreasonably excessive workload that persists for an extended period of time.

The proposed policy is a substantial weakening from the CPR recommendation and the recent Review Division decisions that the exclusion applies to reactions to specific decisions and can include circumstances of the employment.

It is recommended that the policy changes include that the exclusion applies to a workers reaction to specific decisions of the employer to labour relations matters such as promotions, discipline or work assignments. The exclusion should not apply to significant stressors of the work environment that may be the result of employer decisions, but the mental disorder is not a direct reaction to the decision.

Options and Implications

The BC Nurses' Union has the following recommendations on the proposed Discussion Paper options.

Issue #1: Definition of Significant Work-Related Stressor

Option 1B should be applied to amend the policy to define the normal pressures and tensions of employment with modifications from the proposed policy presented by the PRRD in the Discussion Paper. The policy should provide that in determining if the work event(s) are traumatic or significant work-related stressors that this will largely be a matter of how the worker experienced the event(s). As is the case in other policy a short non-exclusive list of factors to consider in weighing the evidence of how the worker experienced the event(s) should be provided. That list would include the worker's description, other evidence regarding details of the event(s), and expert (psychologist or psychiatrist) reports on the effects of the events on the worker and contribution to DSM diagnosed conditions.

Our proposed policy on significant work related stressors would provide improved guidance on when and how to appeal objective and subjective analysis. It would be more consistent with CPR Recommendation #39 particularly the recommendation to include a subjective element in the definitions.

Issue #2: Labour Relations Exclusion

Option 2B should be applied to amend the policy to better define Labour Relations exclusions with modifications from the proposed policy presented by the PRRD in the Discussion Paper. The PRRD proposed language strays far from CPR Recommendation #40 that the exclusion be applied to reactions to the employers' actual decisions, not workplace conditions as a whole. This very language should be included in the policy as it is clear and unambiguous. The exclusion should apply to reactions directly the result of specific labour relations decisions.

The example in CPR Recommendation #40 is quite helpful.

Comparisons to WCAT decision 2014-02522 and R0247662 provides a stark example why there is a need for such clear language on the employer decision exemption. Both cases deal with claims in which Nurses suffered mental disorders as a result of egregiously heavy workload. In the former case the worker's claim was denied because of a very broad interpretation of the labour relations exclusion. In the latter case the worker's claim was accepted as a result of a conclusion that the labour relations exclusion does not apply to egregiously heavy workload.

Mental (Psychological) Stress and the Need for Alternatives to DSM Diagnosis Requirement

Mental Disorder claim adjudication is often unreasonably delayed due to the time it takes to conduct psychological assessments that commonly provide both DSM diagnosis by an expert and opinion on factors that caused/contributed to the diagnosis. Currently, we are seeing a delay of five months or more for workers to be seen for initial adjudication psychological assessments. For workers that have suffered psychological injury these delays compound the damage. The current delays are unacceptable. On an operational basis measures must be taken to reduce these delays. In our view a reasonable service standard is that psychological assessments for Mental Disorder claims should be completed within four weeks of referral.

There are other measures that would likely help relieve the delays to some degree and improve outcomes. New Directions: Report of the WCB Review 2019 by Janet Patterson in recommendation #89 proposed that short-term psychological injury may be accepted for a disability not to exceed ten (10) working days without a DSM diagnosis. The preceding recommendation also recommended changing the term Mental Disorder in section 5.1 of the Act (now section 135) to psychological injury. There should be a category of personal injury of psychological injury that is restricted to disability of no more than 10 days and does not require a DSM diagnosis. This would help in not potentially stigmatizing workers that experience psychologically stressful events at work that require very short absences with a mental disorder label. It would also free up resources by not requiring psychological assessments for such very short disabilities.

Conclusion

The Mental Disorder policy should be amended as recommended above.

All of which is respectfully submitted.

Yours truly,

BRITISH COLUMBIA NURSES' UNION

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