CPHR British Columbia & Yukon

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WorkSafeBC
PO Box 5350 Stn Terminal
Vancouver, BC
V6B 5L5

Attention: Lori Guiton – Director of Policy, Regulation and Research

Re: Mental Disorder Policy Review – Proposed Amendments

We write on behalf of the Public Policy Committee of the Chartered Professionals in Human Resources Association of British Columbia & Yukon (CPHR BC & Yukon). Founded in 1942, CPHR BC & Yukon has grown to include more than 8,000 members encompassing CEOs, VPs, directors of HR, HR generalists, HR advisors, consultants, educators, students and small business owners in BC and the Yukon. We support our members with education and advocacy and, where public policy topics affect HR professionals or their area of practice, we provide our feedback and recommendations to government.

We write today to provide our perspective on the mental disorder policy review that is currently underway and the amendments that have been proposed recently by WorkSafeBC's Policy, Regulation and Research Department.

The perspective we offer is valuable because many of our members are responsible for the management of mental disorder claims within the framework of the *Workers Compensation Act* (the "Act") and are not only directly affected by any changes to the Act but offer a wealth of practical experience on the topics addressed below.

Scope of Submission

The Act states that a worker may be entitled to compensation for a mental disorder if it is:

- a reaction to one or more traumatic events arising out of and in the course of the worker's employment; or

- 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.

The Act excludes compensation for a mental disorder which is caused by a decision of a worker's employer relating to the worker's employment – the so-called *labour relations exclusion*.

We have significant concerns about the two amendments proposed to the mental disorder policy in Volume II of the Rehabilitation Services & Claims Manual (RS&CM):

- recommendation #39 proposes to remove the requirement for the stressor to be unusual; and
- recommendation #40 proposes to add guidance to change the parameters of the labour relations exclusion.

Significant Work-Related Stressor

Under the current policy, the definition of "significant work-related stressor" includes a comparison to normal pressures and tensions of *the worker's* employment. The amendment proposes to broaden the definition to employment generally.

The new definition of significant work-related stressor would include a comparison to the normal pressures and tensions of employment at large rather than a comparison to the worker's specific employment. It would shift policy away from the traditional worker-centric approach, where every worker's situation is adjudicated, quite properly, on its own merits.

If it were possible to generalize such a broad range of pressures and tensions from all types of employment (which it is not), that is not nearly as relevant as the normal pressures and tensions of the worker's own employment. An unusual stressor, by definition, should be compared to the usual stress inherent in the employment which the worker chose in accepting that employment, subject of course to all applicable injury prevention legislation.

As HR professionals, we match workers to employment daily through recruitment, interviews and appropriate compensation plans, all in conjunction with the proper management of worker safety in a very wide range of employment. As part of our responsibility, we need to understand the vast difference in workers' aptitude and ability to manage work-related stressors by requiring them to demonstrate that they can multi-task, adapt to change, prioritize tasks, communicate challenges, learn on the job, delegate effectively, seek guidance, etc. From our direct observations and on-the-job experience, we know firsthand that not all workers have the same aptitude or ability to manage the pressures and tensions of employment in the same way or generally and respond to the pressures and tensions of specific employment differently.

Additionally, there are workers who have a greater aptitude and ability and, in some cases, a preference for employment that has a higher level of work-related stress. While those types of employment may require

additional injury prevention measures to manage risk, workers who seek out such employment understand and appreciate that the risk of a mental disorder injury in their line of work may not be the same as for employment generally. This does not mean that they accept a higher rate of injury but they do accept the risks are higher in certain types of employment, due to inherent stressors, and the measures around prevention and mitigation are therefore more stringent. This is no different than in the case of employment with a higher risk of *physical* injury, where the workers assume a higher risk of injury with higher expectations for prevention and mitigation.

One cannot simply compare the risk of injury in extremely dangerous employment or inherently safe employment with employment generally, but one can manage the risk differently to prevent and mitigate injury.

We maintain that the only acceptable way to define a significant work-place stressor as unusual is by comparison to the normal pressures and tensions in the worker's specific employment. That is what both the worker and the employer would expect to be unusual in relation to the cause of an injury. It is also consistent with the conventional worker-centric approach and has proper regard to the employment that the employer offered and the worker accepted, the worker's particular aptitude and ability and the inherent risks of the work.

Labour Relations Exclusion

As noted above, the Act excludes compensation for a mental disorder which is caused by a decision of a worker's employer relating to the worker's employment – the labour relations exclusion.

The amendment proposed to the mental disorder policy in the RS&CM seeks to provide guidance on the limits of the exclusion through examples of when it may not apply.

Those examples include decisions that:

- result in an unreasonably excessive workload persisting for an extended period of time;
- are made or performed in bad faith; or
- are communicated to the worker in an abusive or threatening way.

As a professional body of HR practitioners, we agree that *how* an employer's decisions are made and communicated are relevant considerations when applying the labour relations exclusion. There should be no exclusion where there is clear, cogent and convincing evidence and objective proof that managerial authority was exercised in bad faith or the employer conducted itself improperly in communicating employment decisions through, for example, bullying and harassment, abuse or threats.

However, as HR professionals, we know that no two workers are the same. Expectations around workload are inherently different for each worker in every type of employment and potentially across every different employer.

Expectations of a reasonable workload can also vary for the same worker over time, depending on a number of factors. Perhaps most importantly, workload concerns can arise suddenly where previously there was none or, in some situations, when a worker is unhappy about an unrelated employer decision.

A common definition of workload is "the amount of work or of working time expected or assigned". See the Merriam-Webster dictionary at https://www.merriam-webster.com/dictionary/workload.

Viewed another way, workload is the work assigned to a worker by the employer in the management of the business or operation. An employer has the management prerogative to manage a worker's workload and provide for the strategic distribution of work throughout the workforce in order to maximize employee skills and performance to meet business and operational objectives.

Capacity for work, work prioritization skills, delegation opportunities and the ability to create efficiencies are some of the variables which HR professionals identify and on which they rely to support managers as they distribute work and set expectations for completion. All of those factors affect a worker's workload or the expected time to complete the work assigned but they are all different depending on the type of employment and worker assigned to the work.

The underlying assumption in the proposed amendment that everything a worker does in the workplace is decided at some level by the employer is unquestionably erroneous.

In fact, workers continually make decisions, many such decisions and often independently, inside and outside the workplace everyday, and workload is a great example of how those decisions materially affect the worker's "workload".

Leave aside for a moment such things as variability in worker skills, abilities and motivation and take, for example, two workers who are given the same volume of work with the same deadline for completion.

Worker A avails herself of all the organizational tools available to her. She uses those tools and is able to prioritize her tasks. She also understands and appreciates the benefit of including others where she can in support of the work she needs to complete. Her independent decisions to work as efficiently as possible allow her to complete the work within the assigned time.

Worker B often complains that he does not have the time to use the organizational tools available to him. He finds that he works best tackling tasks as they come. He does not prioritize things and is often stressed to meet the deadline as he did not build in any contingency when planning his work. He does not believe in involving others to support him as his view is he the only person who can do the job right. His perception could be that he has an excessive workload because he cannot seem to get everything done in time. The reality, however, is that his perception has been shaped by the decisions he has been making and not the volume of work or the assigned time. In other words, the workload is not the cause of his stress but rather his capacity or inability to manage the work efficiently.

WorkSafeBC would not be able to discern whether a claim of injury was the result of workload caused by the work environment because only the employer is in a position to understand what types of decisions a worker could have taken in the workplace to result in a better workload or different perception of the workload.

To determine that a workload is unreasonable or excessive, it must be compared to one that is "reasonable" and "not in excess" but those base lines are different for each worker and each employer in different types of employment and are best determined as part of the employment relationship and the exchange of consideration between the parties.

With respect to volume of working time, including maximum hours of work and required compensation for time worked, there are already extensive protections in place for workers in British Columbia. Among those protections are the statutory provisions and requirements of the *Employment Standards Act*, the terms and conditions of employment agreed between employers and trade unions in collective agreements and between employers and employees in individual employment contracts, and the common law (judge-made law) rules around constructive dismissal.

In the course of the mental disorder policy review that is presently underway, one should be cautious not to erode the basic management right to make decisions about the distribution of work to workers, including the amount and type of work required and the time to do it. That would be imprudent and undermine the integrity of the employment relationship and the basic bargain around the exchange of worker services for compensation – what the Supreme Court of Canada has described as "the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration": *Hydro-Quebec* v. *Syndicat des employe-e-s de techniques professionnelles et de bureau d'Hydro-Quebec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43 at para. 15.

In closing, CPHR BC & Yukon is pleased to make this submission and any question you might have should be directed to the Chair of the Public Policy Committee, James D. Kondopulos, at jkondopulos@ropergreyell.com.

Truly yours,

Chartered Professionals in Human Resources of British Columbia and Yukon (CPHR BC & Yukon)

Per: 

James D. Kondopulos, CPHR
Chair, Public Policy Committee and Board Director

cc: Public Policy Committee
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