

Canadian Union of Public Employees

# Guide for Filing WorkSafeBC Mental Disorder Claims

WCB Advocacy Department – BC Regional Office

Tom McKenna, National Representative, WCB Advocacy

Nothing in this Guide should be construed as legal advice or advocacy. The information provided is for general education purposes only and is subject to ongoing change and revision.

3/3/2014

## INDEX

ADDITIONAL INFORMATION.....	12
BACKGROUND .....	3
CONCLUSION .....	12
CRITERIA TO BE APPLIED TO MENTAL DISORDER WCB CLAIMS.....	5
DEFINITIONS & APPLICATION TO WCB CLAIMS – DIFFERENT TESTS FOR DIFFERENT TYPES OF CLAIMS AS PER SECTIONS 5(4) AND 5.1 OF THE ACT .....	6
EMPLOYER PROTESTS.....	12
EXCLUSIONS & EXCEPTIONS .....	7
GATHERING EVIDENCE AND FILING A WCB CLAIMS – CLAIMS PROCESS.....	7
INSTRUCTIONS FOR PSYCHOLOGISTS AND PSYCHIATRISTS FROM THE WCB .....	9
INTRODUCTION .....	3
OTHER MATTERS AND LABOUR RELATIONS ISSUES.....	10
SAMPLE QUESTIONS FOR PSYCHOLOGISTS AND PSYCHIATRISTS .....	10

## INTRODUCTION

This Guide has been prepared to assist CUPE Locals, members and physicians acting on behalf of CUPE members who have filed a WorkSafeBC (“WCB”) claim for mental disorders arising out of one or more traumatic work-related events; mental disorders arising out of a significant work-related stressor, including bullying or harassment, or a cumulative series of significant work-related stressors; and mental disorders related to physical injuries including pain conditions. Each of these three main categories may have different tests for acceptance. In addition these are very different tests for bullying and harassment and mental disorders depending upon if OH&S policy & RSCM (claims) & related policy are reviewed. Ensure the correct policy; practice directives, regulations and law are applied. These have been included for comparison purposes, though this document is not intended for OH&S complaints.

The WCB claims process may occur in addition to Collective Agreement entitlements, Human Rights complaints, Occupational Health & Safety Regulations processes, et ceteras.

This Guide does not replace the *Workers’ Compensation Act* (the “Act”), WCB Policy, or WCB Practice Directives (which are not binding). This Guide is not legal advice. Consult your Local Union as to whether a grievance should be filed under the Collective Agreement or applicable legislation applies.

## BACKGROUND

On May 31, 2012, Bill 14, *Workers’ Compensation Amendment Act, 2011*, received Royal Assent. Bill 14 addressed Policy changes for compensation for Mental Disorders.

Under Bill 14, there are now three (3) main categories where a worker may be entitled to compensation if the Mental Disorder (often called “mental stress” previously) involves:

A. MENTAL DISORDERS ARISING FROM PHYSICAL INJURIES:

A reaction such as a mental disorder arising from physical injuries, including pain conditions, as per Section 5(4) of the *Act*, or,

B. TRAUMATIC EVENTS:

A reaction to one or more traumatic event arising out of and in the course of the worker’s employment, as per Section 5.1 of the *Act*, or,

C. WORK RELATED STRESSORS OR SERIES OF WORK RELATED STRESSORS:

A significant work-related stressor, including bullying or harassment, or a cumulative series of significant work-related stressors, as per Section 5.1 of the *Act*. These are

predominantly caused by employment and arise out of and in the course of the worker's employment (2 part test).

Each of these categories have different tests for acceptance of the claim.

Other key changes to section 5.1 of the *Act*, in respect to "B" and "C" above, include:

- Replacing "mental stress" with "mental disorder"
- Replacing the references to "physician" with "psychiatrist" and "psychologist"
- Includes bullying or harassment as an example of a significant work-related stressor (but noting that interpersonal conflict is not generally considered significant unless it is threatening or abusive)

The *Act* now directs that there must be the following present, especially for "B" and "C" above:

- A diagnosis by a psychiatrist or registered psychologist
- A mental disorder be diagnosed as a mental or physical condition described in the most recent DSM at the time of diagnosis
- WorkSafeBC may appoint a psychiatrist or psychologist to review the diagnosis

However, the WCB will consider all of the relevant medical evidence to determine whether there is a DSM diagnosed mental disorder.

Practice Directives interpret Policy, although they are not binding and merely a guide.

This is distinguished from WCB OH&S Policy and Regulations on harassment & bullying.

Policy D3-115-2 ("Policy") states:

"Definition: Bullying and harassment

- a) Includes any inappropriate conduct or comment by a person towards a worker that the person knew or reasonably ought to have known would cause that worker to be humiliated or intimidated, but
- b) Excludes any reasonable action taken by an employer or supervisor relating to the management and direction of workers or the place of employment."

Bullying and harassment are not found in RSCM II as definitions; rather, the wording refers to mental disorders and work related stressors.

### **CRITERIA TO BE APPLIED TO MENTAL DISORDER WCB CLAIMS**

This is distinguished from WCB OH&S Policy and Regulations on harassment & bullying.

Policy D3-115-2 ("Policy") states:

"Definition: Bullying and harassment

- a) Includes any inappropriate conduct or comment by a person towards a worker that the person knew or reasonably ought to have known would cause that worker to be humiliated or intimidated, but
- b) Excludes any reasonable action taken by an employer or supervisor relating to the management and direction of workers or the place of employment."

Bullying and harassment are not found in RSCM II as definitions; rather, the wording refers to mental disorders and work related stressors.

Generally, in order for a WCB claim (for claims under categories "B" and "C" above) to be accepted, there must be:

1. A DSM (V) Diagnosis, and,
2. An event or events, or a stressor or cumulative series of stressors, and,
3. Evidence the event(s) was traumatic or the stressor(s) was significant, and,
4. Evidence the mental disorder was a reaction to one or more traumatic event(s) arising out of and in the course of the worker's employment, and,
5. Evidence the mental disorder predominantly was caused by a significant work-related stressor(s) but not in the case of stressors, cumulative series of work related stressors, etc. (See RSCM II Policy C3-13-00, page 5).

Again, please be aware there are distinctions between policies, practice directives and law applying to claims as opposed to OH&S policies i.e. D3-115-2, D3-116-1, D3-117-2, Section 115, 116, 117 (WC Act), G-03-115(1)-3 (WC Act Guidelines).

**DEFINITIONS & APPLICATION TO WCB CLAIMS – DIFFERENT TESTS FOR DIFFERENT TYPES OF CLAIMS AS PER SECTIONS 5(4) AND 5.1 OF THE ACT**

A work-related stressor(s) is “significant” when it exceeds the intensity and/or duration expected from the normal pressures or tensions of the worker’s employment.

As per a line of developing decisions of the WCAT, the word “significant” has been defined as:

- A.     i.       when it is excessive in intensity
- ii.       and/or when it is excessive in duration
- B.     when (i) and/or (ii) are compared to what is experienced normally in the worker’s employment

Therefore, this term has three parts. Ideally, all 3 should be present. At minimum, A(i) or A(ii) and B should be present.

Interpersonal conflict is not generally considered significant unless it is threatening or abusive.

Examples may include exposure to workplace bullying or harassment. Interpersonal conflicts between the worker and co-workers or customers are not generally considered significant unless the conflict results in behavior that is considered threatening or abusive.

A traumatic event is an emotionally shocking event and is generally unusual and distinct from the duties and interpersonal relations of the worker’s employment. It does not preclude a worker who is exposed to traumatic events on a frequent basis – e.g. emergency workers. The WCB looks for evidence that the worker must have suffered or witnessed the traumatic event first hand and that the reaction was typically immediate and identifiable but may be delayed. Cumulative stressors may include bullying, harassment, stalking, etc.

One question the WCB will ask is if the Mental Disorder is (a) predominantly caused by a significant work-related stressor, or a cumulative series of significant work-related stressors, and is (b) arising out of and in the course of the worker’s employment in non-traumatic event claims. This includes:

- Is the stressor or stressors work-related? Are they similar to traumatic event considerations?
- Is the significant work-related stressor, or cumulative series of significant work-related stressors, the predominant cause of the mental disorder?
- Policy provides that “predominant cause” means that the significant work-related stressor(s) are the primary or main cause of the Mental Disorder.

The registered psychologist or psychiatrist must answer these questions in any medical reports. Again, all the tests must be met for cumulative stressors.

### **EXCLUSIONS & EXCEPTIONS**

Bill 14 and Policy exclude Mental Disorders caused by a decision of the worker's employer relating to the worker's employment, including:

- A decision to change the work to be performed or the working conditions.
- A decision to discipline the worker.
- A decision to terminate the worker's employment.
- Decisions of the employer relating to workload and deadlines, work evaluation, performance management, transfers, changes in job duties, lay-offs, demotions and reorganizations.

### **GATHERING EVIDENCE AND FILING A WCB CLAIMS – CLAIMS PROCESS**

In light of the onerous changes to Policy and an increased number of criteria, acceptance of Mental Disorder claims may be much more difficult. For example, obtaining the required DSM diagnosis from a psychiatrist or psychologist may take months. This could allow the WCB to argue that the worker failed to seek medical treatment or to submit medical evidence in a timely manner.

WCB claims for Mental Disorders may have a greater chance of acceptance if the following practices are adhered to (which is in addition to the previous Guides and templates forwarded to CUPE Locals):

1. The member should immediately file a WCB complaint where workplace harassment, bullying, or a traumatic event occurs. The member should file a complaint questionnaire where upon a Prevention Officer will review it. The online questionnaire is at:  
[https://online.worksafefbc.com/Anonymous/wcb.BullyingAndHarassment.web/default.aspx?\\_ga=1.28111292.1036833605.1392152133](https://online.worksafefbc.com/Anonymous/wcb.BullyingAndHarassment.web/default.aspx?_ga=1.28111292.1036833605.1392152133)

Ensure the member prints a copy of the completed forms and questionnaire for the Local as well. This should be copied to the OH&S Committee – marked as "Confidential".

2. This also means filing the Form 6 application for compensation within 24 hours. NOTE: Federal government or federally regulated employees fall under different Policy and/or legislation." to "Ensure a Form 6 Application for Compensation is filed within 24 hours.

NOTE: Federal government or federally regulated employees fall under different Policy and/or legislation.

3. The member should immediately contact the supervisor, OH&S Committee and Union representative. This usually means contacting these persons by telephone or in person the same day as the occurrence.
4. The member should fill out an Incident Report, Accident Report or Log on the same day as the occurrence.
5. The member, via the Local, should ask the employer for copies of the Incident Report, Accident Report or Log entry.
6. The member should seek medical attention, from a Clinic or Family Physician the same day as the occurrence(s).
7. The member should advise the physician that the reason for the consultation is a work related WCB claim, wherein a possible Mental Disorder diagnosis may have resulted.
8. The member should provide a copy of this Guide to the physician for review, with particular emphasis on the required criteria under Section 5.1 of the *Act* (e.g. a DSM diagnosis by a psychologist or psychiatrist). This includes having the following questions addressed in any medical opinions or reports as well:
  - Is the stressor or stressors work-related? Similar to traumatic event considerations?
  - Is the significant work-related stressor, or cumulative series of significant work-related stressors, the predominant cause of the mental disorder?
  - The draft policy provides that “predominant cause” means that the significant work-related stressor(s) are the primary or main cause of the mental disorder.
9. The member should ask the physician for a referral to a psychologist or psychiatrist. Ask to be put on the cancellation list. NOTE: Employee and Family Assistance Program records may be requested by the WCB.
10. The member should ask the physician to provide a copy of this Guide to the treating psychologist or psychiatrist.
11. The member should provide a copy of the *Form 8/11 Guide* to the physicians. This was prepared for CUPE Locals and is available upon request.



12. The member should keep a detailed diary of any conversation, correspondence, telephone calls, appointments, treatment or symptoms related to the WCB claim.
13. The outcomes from the claim and OH&S processes can vary substantially. A member may have their WCB claim allowed but have the Bullying and Harassment complaint denied. These are separate appeal mechanisms for both, in addition to the grievance process (& other processes outside the WCB).

It is important to remember that the Duty to Represent obligations under Section 12 of the BC Labour Code normally only apply to matters arising out of the Collective Agreement as opposed to the WCB claims process (which is differentiated from the WCB OH&S processes and obligations).

### **INSTRUCTIONS FOR PSYCHOLOGISTS AND PSYCHIATRISTS FROM THE WCB**

As per the link below, the WCB has provided the following instructions on what to do if a patient presents with a Mental Disorder:

- Physicians must not act as advocates.
- Provide the patient with treatment and any appropriate referrals as you would do normally. Where medically appropriate, encourage early return to work.
- Send a Physician's Report (Form 8/11) to WorkSafeBC if you, or the patient, think the Mental Disorder is work-related (see information above regarding what is covered by Workers' Compensation and what is not).
- Include an appropriate diagnosis on the Physician's Report (Form 8/11).
- WorkSafeBC appreciates physicians providing as detailed a report as possible, including a thoughtful diagnosis. Although the legislation now requires a psychologist or psychiatrist to provide a DSM diagnosis in order for the worker's claim to be accepted, detailed information from a physician is of value to WorkSafeBC in adjudicating and managing the worker's claim. Once your report is received, WorkSafeBC will adjudicate the claim and refer the worker for any necessary assessments, including a psychiatry or psychology assessment where appropriate.
- Psychiatrists will also continue to use a Physician's Report (Form 8/11) where they think the patient's Mental Disorder is work-related.
- If the Mental Disorder appears to be work-related, please encourage your patient to report the injury by contacting WorkSafeBC's Teleclaim service at

1-888-WORKERS (1-888-967-5377).

- As with all other claims, the usual fee for your initial report will be paid by WorkSafeBC, but coverage for subsequent visits is dependent on whether the worker's claim is accepted.

### **SAMPLE QUESTIONS FOR PSYCHOLOGISTS AND PSYCHIATRISTS**

The following sample questions are for psychologists and psychiatrists in order to have them address the criteria required under Bill 14 and WCB Policy. Medical practitioners cannot act as advocates however.

- A. What are the current employment related DSM diagnoses? There may be more than one (1). Pain Disorders may be applicable as well.
- B. Were there any pre-existing diagnoses?
- C. Were the pre-existing diagnoses aggravated, accelerated or activated by employment? How?
- D. Were the diagnoses predominantly caused (is it the main cause) by employment in non-traumatic event claims eg. Cumulative Stress claims? (See page 3) How? A work-related stressor(s) is "significant" when it exceeds the intensity and/or duration expected from the normal pressures or tensions of the worker's employment.
- E. What was the employment related stressor(s), event or series or events?
- F. How did each contribute to the diagnosis?
- G. Were there any non-compensable employment stressors such as discipline, workload, a change of working conditions, performance management, transfers, demotions, et ceteras?
- H. What is the prognosis for each diagnosis?

### **OTHER MATTERS AND LABOUR RELATIONS ISSUES**

Questions and issues that may arise during harassment and bullying related WCB claims, which should be addressed in conjunction with the relevant OH&S policies i.e. as indicated on pages 5 and 6:

1. How old are the complaint(s), recognizing that there is a distinction between grievances / labour relations and WCB claims and the processes required for each?
2. What Collective Agreement language may apply? Does LTD apply? Other?

3. What type of grievance investigations, OH&S investigations, et ceteras should be conducted? Are the RCMP or Police involved?
4. Has the National Representative been notified? Employers are increasingly attempting to argue the notion of fault and violation of employer Policies and Procedures.
5. What procedural protections need to be put in place to ensure fair treatment of the complainants, witnesses and accused employee(s)?
6. What confidentiality protections should be put in place for the complainants, witnesses and accused employee(s)? 60% of claimants withdraw their claims due to privacy issues and concerns over the employer having access to medical records.
7. What safeguards need to be implemented to prevent and protect against reprisals directed at complainants, witnesses and accused employee(s)? Is a protection plan needed as required in Ontario for non-employee / external harassment and bullying?
8. Is there privilege involved? If so, what is it? Has the National Representative and/or Legal department via the National Representative been notified?
9. Are there investigation reports?
10. Are these subject to privilege as per No. 8?
11. Has separate representation at the Local and National level been provided for the complainants and respondents, if applicable?
12. Has Union representation been provided to the complainants and respondents at all meetings with the employer?
13. Is the “National Standard of Canada for Psychological Health and Safety in the Workplace” applicable?
14. Has it been applied? How?
15. Is the employer aware of their obligations under the “National Standard of Canada for Psychological Health and Safety in the Workplace”? This is the current de facto best practices document, however, the WCB does not have a formal written Policy on RTW/GRTW for employees with a mental disorder.
16. Is the employer aware of their obligations under the new WorkSafeBC OH&S regulations pertaining to bullying and harassment? Is the employee?

17. Has a risk assessment been conducted for psychological risks and safety?
18. What indicators were used?
19. Where did they come from?
20. Is stress measured? How?
21. How are employee records and information protected during investigations, assessments and hazard reviews?
22. Does the employer have a psychological health and safety policy?
23. Was it vetted by WorkSafeBC, the Union, et ceteras?
24. Does it comply with the Act, Policy, the “National Standard of Canada for Psychological Health and Safety in the Workplace” and the Collective Agreement?
25. How has this been implemented including training for OH&S Committee members?

## **EMPLOYER PROTESTS**

Employers will protest claims where there is no DSM diagnosis by a psychiatrist, where causation is not present and where labour relations issues are present.

## **CONCLUSION**

The medical evidence must adhere to the criteria established in Policy and in the *Act*. Where one (1) or more criteria have not been satisfied, the WCB may deny the claim. Subsequent appeals and the stress or DSM diagnoses arising out of the appeal process are not usually compensable. Therefore, it is important that CUPE members and their medical practitioners familiarize themselves with this Guide in advance of a WCB claim.

## **ADDITIONAL INFORMATION**

Additional information may be obtained from the following sources:

1. “Legislative Changes to Adjudicating Mental Disorder Claims”

[http://www.worksafebc.com/news\\_room/features/2012/assets/pdf/](http://www.worksafebc.com/news_room/features/2012/assets/pdf/) or

<http://search.worksafebc.com/search/?sp-a=sp10024f66&sp-p2=any&sp-f=ISO-8859-1&sp-q=mental+disorders&sp-k>

## GUIDE FOR FILING WORKSAFEBC MENTAL DISORDER CLAIMS

2. "Implementation of changes to coverage for Mental Disorders – Bill 14"

[http://www.worksafebc.com/news\\_room/features/2012/new\\_062712.asp](http://www.worksafebc.com/news_room/features/2012/new_062712.asp)

3. "Mental Health in the Workplace"

<http://www2.worksafebc.com/Topics/workplacementalhealth/introduction.asp?reportID=36882>

4. "Proposed policies to implement Bill 14 amendments"

[http://www.worksafebc.com/regulation\\_and\\_policy/policy\\_consultation/law\\_40\\_10\\_86\\_0.asp](http://www.worksafebc.com/regulation_and_policy/policy_consultation/law_40_10_86_0.asp)

5. "Physicians, July 5, 2012, Changes to Workers' Compensation Coverage for Mental Disorders"

<http://search.worksafebc.com/search/?sp-a=sp10024f66&sp-p2=any&sp-f=ISO-8859-1&sp-q=mental+disorders&sp-k> or

[http://www.worksafebc.com/health\\_care\\_providers/Assets/PDF/IB201259.pdf](http://www.worksafebc.com/health_care_providers/Assets/PDF/IB201259.pdf)

