Our File No.: LF: MoveUP

July 12, 2019

Janet Patterson
WCB Review 2019
PO Box 97122 Stn Main
Richmond, BC V6X 8H3

Dear Ms. Patterson:

Re: Submission for WCB Review 2019 – MSIs and Bullying and Harassment Claims

MoveUP is a British Columbia union that represents approximately 12,000 members. Many of MoveUP's members work in finance, transit, IT, transportation, Crown corporations, security, and other office and professional sectors. Many work with computers for the majority of their work day and a common injury resulting from these activities is musculoskeletal (MSK) disorders. Another type of WCB claim often seen in office environments is psychological injury due to bullying and harassment (B&H). Since MSK and B&H claims are the most common type of claim seen by MoveUP members, this submission focuses on these two types of injuries and the WCB's adjudication of them.

EXECUTIVE SUMMARY

With the increase of technology in workplaces, more and more workers are using computers for most of their workday. Research demonstrates a connection between repetitive computer use and MSK disorders but despite this, the WCB has a pattern of denying computer-related MSK disorders.

Another type of claim that is often denied by the WCB is mental disorders due to bullying and harassment (B&H) at work. With the increased use of the internet, cyberbullying is an up and coming issue and the WCB needs to develop policies to adjudicate these types of claims.

So, it follows that accurate risk assessments to measure ergonomic risk factors are necessary to adjudicate these types of claims. The way the WCB currently obtains and quantifies this evidence is inadequate. Generally, on appeal of claim denials, an ergonomic and medical-legal opinion obtained to support the appeal usually result in acceptance of the condition as work-related. This is striking considering the pattern of WCB denials seen in this area of injury.

The WCB needs to update their policy to reflect what medical literature has found regarding computer-use and MSK disorders. There should be an Occupational Disease and Injury Advisory Committee that would review occupational diseases and ASTDs and provide advice on emerging trends in medical science. Professional ergonomic assessments at the beginning of claim adjudication would assist in getting it right the first time and ensuring the correct diagnosis is adjudicated following medical investigations would result in a more worker-centered approach to these claims. Special attention should be given to the prolonged duration of computer-work, whether other workers in the same job are experiencing similar symptoms, and whether the condition is made worse by computer use at work. These factors are not given much weight whatsoever currently. The compensation policies should reflect the OH&S policies of the *Workers Compensation Act* (the "*Act*").

With respect to B&H, in order to have a mental disorder accepted as compensable by the WCB, an injured worker (1) must demonstrate they were exposed to B&H at work, (2) demonstrate the B&H is the predominate cause of the mental disorder, (3) must have a DSM-5 disorder diagnosed by a psychiatrist or psychologist, and (4) demonstrate that the mental disorder was not caused by a decision of the employer relating to the worker's employment.

The WCB policy needs to have guidance with respect to when the one-year timeline pursuant to s. 55 of the *Act* is triggered in B&H cases. Date of disability is a reasonable date to use. There needs to be a clear understanding of what constitutes personality conflict and B&H so that the WCB does not continue to conflate the two. Workers' evidence about what occurred needs to be given adequate evidential weight and there should be accountability for WCB decision makers who base their decisions on little to no evidence. The definition of B&H from the OH&S side of the *Act* should be consistent with the compensation side. In its current state, there are two different definitions used depending on which side of the *Act* you are dealing with and this results in inconsistency among cases.

The predominate cause test under the B&H provision has a higher causation threshold than physical injuries and this needs to be changed so that if B&H played more than a trivial or insignificant role in the development of a mental disorder, the mental disorder should be accepted. It would also be helpful to have a scientific literature review on what experts have to say about B&H and to include experts in case adjudication. For cyber-bullying cases, there should be a separate policy related to whether the cyber-bullying is sufficiently connected to the workplace instead of the usual "arises out of and in the course of employment" Rehabilitation Services and Claims Manual (RSCM II) policy item C3-14.00 factors.

Generally, the WCB should place more evidential weight on what workers have to say about their conditions. The WCB should speak with and give consideration to treating physicians more often to determine entitlement decisions. Appeal deadlines should be extended to at least one year instead of 90 and 30 days and extensions of time should be allowed more often and in cases where a worker does not understand what entitlements flow from certain decisions.

A worker centered culture and approach needs to be established for the WCB to operate fairly and in line with the Meredith principles. Now is the time for much needed change.

COMPUTER-RELATED ACTIVITY-RELATED SOFT TISSUE DISORDERS (ASTDs)

Introduction

With the increase of technology in workplaces, more and more workers are using computers for most of their workday. Research demonstrates a connection between repetitive computer use and MSK disorders, especially when computer use is prolonged.

The WCB has a pattern of denying claims for computer-related MSK disorders, referred to as ASTDs by the WCB. A Freedom of Information request to the WCB returned the following statistics:

Registration year	Total ASTD Apps	Allowed	Denied	Other*	% of ASTD Apps Accepted	Computer-related (CR) ASTDs accepted**	Cumulative CR ASTDs accepted	% of accepted ASTDs that are CR
2010	4762	1354	1533	1875	28%	21	21	1.5%
2011	4824	1557	1637	1630	32%	28	49	1.7%
2012	4931	1580	1855	1496	32%	18	67	1.1%
2013	4925	1736	1763	1426	35%	19	86	1%
2014	4916	1409	1851	1656	29%	15	101	1%
2015	4961	1494	1907	1560	30%	23	124	1.5%
2016	5112	1706	1783	1623	33%	19	143	1.1%
2017	5121	1603	1804	1714	31%	19	162	1.1%
2018	5491	1845	1848	1798	34%	23	185	1.2%

* "Other" decision group includes eligibility statuses of pending, suspended, rejected, and no adjudication required.
** the WCB could not determine how many computer-related ASTDs were denied because they aren't coded as computer-related unless they are time loss claims. So, these results only include claims with time loss.

From 2010-2018 there were 45,043 ASTD applications submitted to the WCB and of those, only 185 computer-related ASTDs were accepted.

ASTDs generally (non-computer-related and computer-related) have an acceptance rate of approximately 31.5%. Of those accepted claims only 1.2% are computer-related. These results are striking and demonstrate that the WCB does have a tendency to deny computer-related ASTDs more than non-computer-related ASTDs.

Background

ASTD adjudication falls under section 6 of the *Worker Compensation Act*. Section 6, the Occupational Disease provision, provides that where a worker suffers from an occupational disease and is thereby disabled from working and the disease is due to the nature of employment, compensation is payable.

Occupational diseases are different from personal injury in that they occur gradually, over time, and generally aren't the result of a specific incident.

The WCB Policy for ASTDs is in chapter four of the Rehabilitation Services and Claims Manual, Volume II (RSCM II) at policy items C4-27.00 – C4-27.36. If there is a strong association between a process or industry and a specific ASTD, it is included in Schedule B and a rebuttable presumption applies that work caused the ASTD. If the condition is not included in Schedule B, then the WCB assesses work causation based on the circumstances of the individual case, with consideration of risk factors set out in policy, and the current medical/scientific evidence.

The policy provides that risk factor analysis and how the worker interacts with the work environment are important considerations in ASTD adjudications. The following risk factors are considered: cold temperature, dose, duration, force, frequency, grip type, hard-arm vibration, local contact stresses, magnitude, posture, repetition, static load, task variability, unaccustomed activity, work cycle, work-recovery cycle.

Schedule B includes hand-wrist tendinopathy, shoulder bursitis and shoulder tendinopathy, knee bursitis, and hand-arm vibration syndrome as conditions that attract the presumption of work causation if the work activities meet certain criteria. These criteria are based on the scientific research the WCB relies on. For example, for hand-wrist tendinopathy to be accepted, a worker must have performed tasks that involve any two of the following:

(1) frequently repeated motions or muscle contractions that place strain on the affected tendon(s) (at least one every 30 seconds or with at least 50% of the work cycle spent performing the same motions and less than 50% of the work cycle time to return to a relaxed state);

(2) significant flexion, extension, ulnar deviation or radial deviation of the affected hand or wrist (moving the hand/wrist in greater than 25 degrees of flexion from anatomical neutral, moving the hand/wrist in greater than 25 degrees of extension from functional neutral, moving the hand/wrist in greater than 10 degrees of ulnar deviation, or moving the hand/wrist in greater than 10 degrees of radial deviation);

(3) forceful exertion of the muscles utilized in handling or moving tools or other objects with the affected hand or wrist;

and where such activity represents a significant component of the employment.

So, it follows that accurate risk assessments to measure repetition, postures, and force are necessary to adjudicate a condition under the ASTD policy.

For those conditions not included in Schedule B, the issue is whether the evidence in any claim leads to a conclusion that the condition is due to the nature of the worker's employment. The WCB recognizes epicondylopathy, carpal tunnel syndrome, peripheral nerve entrapments, non-specific symptoms, hypothenar hammer syndrome, and plantar fasciitis as occupational diseases but the condition is adjudicated in the context of its individual case based on all relevant risk factors.

Again, with these conditions, accurate risk factor assessments need to be made in order to accurately adjudicate compensability. The quality of these assessments is important because the most common problem seen with the adjudication of these claims is that the risk factors are not correctly assessed. Assessment issues arise for many reasons that will be discussed further on.

Current Adjudication of ASTDs

A worker develops symptoms in their arms, hands, or wrists that are related to work. For example, the more they type or mouse at work, the more severe the symptoms become. The worker's treating physician indicates that they believe the condition is from overuse, repetitive movements at work, typing, etc. The WCB case manager does a job site visit where they either ask the worker to place their hands on the keyboard and mouse or ask them to do their work activities while they take pictures and/or record a video of them.

The video and/or picture evidence from this job site visit is usually inadequate, especially when the worker was asked to simply place their hands on the keyboard and mouse. This is because it is not capturing the actual work activities the worker was doing at the time of symptom development. The video and/or picture evidence of an injured worker's work activities often fail to capture the full extent of awkward postures because of the angle of the camera.

Repetition is another factor that is not usually accurately captured. Generally, the WCB will find that although a person's work activities are repetitive, they conclude that the person has enough rest in between to not cause injury. This conclusion is not based on any quantification of the

repetition, which is needed when measuring whether work activities like typing or mousing are repeated at least once every 30 seconds, as set out in the hand-wrist tendinopathy policy.

Force is another factor that is not captured correctly by the WCB when they adjudicate ASTD claims related to repetitive-computer use. The WCB finds that because the work activities are sedentary, there is little to no force being placed on affected tissues. This is problematic because force on a tendon can be influenced by pronation/supination and having to hold your arms out to type, which are generally not acknowledged by the WCB. The force placed on a finger tendon when mouse clicking should be measured in order to accurately assess force on that tendon. Concluding that there is minimal force simply because the job is sedentary is inaccurate.

The WCB is supposed to consider awkward postures, repetition, force, etc to complete their risk factor analysis. If the risk factor analysis is based on inaccurate and insufficient information collected during the job site visit, then the risk factor analysis is inaccurate. Generally speaking, for computer-related ASTDs, the risk factor analysis is always negative. As a result, the WCB medical advisors usually always opine that, because there are no risk factors present in the work activities, it is unlikely that work caused the condition. This opinion is given significant weight by the case managers and almost always results in a denial of the claim.

The denial is appealed and usually an appeal requires (1) a professional ergonomic opinion about risk factors present and (2) a medical-legal opinion from a treating physician in order to be successful on appeal. The opinion obtained by the professional ergonomist includes quantification of the work activities performed and usually always finds risk factors present despite the WCB's finding of insufficient risk factors. The ergonomic opinions also find serious flaws in the WCB's risk factor assessment. In that same vein, when physicians who treat injured workers are queried about their opinion, the majority believe that work played a causative role in the development of the ASTD. This evidence obtained for an appeal almost always contradicts the WCB's evidence and because it is higher quality, it is usually preferred by WCAT vice chairs.

Part of the problem with the WCB's treatment of workers is that their treating physicians are not listened to. It is usually the case that if the treating physician indicates that repetitive computer use at work is the cause of the condition, the WCB gives this evidence no evidential weight whatsoever in deciding the claim. Even in cases where there are no non-occupational risk factors present, the WCB still denies the claim.

Practice Directive (PD) #C4-2, *ASTD Claims*, is not binding but the WCB uses this PD to adjudicate ASTD claims. On page 3 of the PD, causative significance is the stated legal test, which means work played more than a trivial or insignificant role in the development of the disease. However, on that same page, the causation test for ASTDs is noted to be

> For the ASTD to be compensable, the work activity must have contributed in a meaningful way. That is not to say that the work injury must be the only cause or the predominant cause of the worker's ASTD. Rather, the work activity must have been a significant contributing factor in order for the ASTD to be compensable.

This causation test is not the same as causative significance because more than insignificant does not equal significant contributing factor. It is also important to note that the PD does confirm that the work activity does not need to be the sole or predominant cause because the majority of WCB Medical Advisors (BMAs) do not apply this test when providing their opinions on causation.

We also note that for Epicondylopathy (Policy Item C4-27.31) and Carpal Tunnel Syndrome (Policy Item C4-27.32) the policy items set out that

> The Board recognizes that where the worker was performing frequent, repetitive, forceful and unaccustomed, employment-related movements (including forceful grip) of the wrist that are reasonably capable of stressing the inflamed tissues of the arm affected by

[epicondylopathy/carpal tunnel syndrome], and in the absence of evidence suggesting a non-work-related cause for the worker's epicondylopathy condition, a strong likelihood of work causation will exist. These factors are not preconditions to the acceptance of a claim for [epicondylopathy/carpal tunnel syndrome] nor are they the only factors that may be relevant.

Despite the direction that frequent, repetitive, forceful, and unaccustomed employment related movements of the wrist are not preconditions to the acceptance of a claim for these conditions, in practice the WCB requires that these factors are present to accept a computer-related ASTD. For example, if repetition and awkward postures are the risk factors identified for a worker who types for the majority of her eight hour shift, the WCB often denies these claims on the basis that the work activities were accustomed (ie: the worker had been doing them for years). Based on policy items C4-27.31 & C4-27.32, repetition and awkward postures should be sufficient risk factors. Further, there have been many cases where there is evidence of repetition related to typing (work-activity), that symptoms increase with typing, that typing involves the tissues in the wrist/hand, and no evidence of non-occupational risk factors but these claims are denied. This is problematic because the policy clearly states that when there is an "absence of evidence suggesting a non-work-related cause", a strong likelihood of causation will exist. Unfortunately, for the majority of computer-related ASTD claims, this piece of policy is not applied during adjudication.

This summary of adjudication can be generalized to most of the computer-related ASTD cases MoveUP has repeatedly seen. The fact that professional ergonomists and doctors outside of the WCB commonly support work causation in computer-related ASTD cases, demonstrates the serious problem with the way the WCB adjudicates these types of claims. This is an entire group of workers that are losing benefits they should be entitled to.

Areas For Improvement

The WCB needs to re-consider the risk factors associated with different ASTD conditions. This requires an unbiased medical literature review. There are countless studies that demonstrate that prolonged computer use is a risk factor for developing musculoskeletal injury.

For example, some research has concluded the following (included in enclosures):

- "Computer users faced higher possibility of getting RSI due to their prolonged working time and static posture [...] This study also found three major risk factors of RSI in Telecommunication Company X. These risk factors were (a) body posture during working; (b) work stress; and (c) work station design." (Repetitive Strain Injury (RSI) among computer users: A case study in telecommunication company);

- "This indicates that more people will have pains related to bad sitting position while working for a period of time at a stretch. It was also discovered from the survey that 87.4% of the respondents who suffered from one pain or the other are those that usually work on the computer system for more than three hours at a stretch." (An Investigation of Incidences of Repetitive Strain Injury among computer users in Nigeria);

- "The results of this review of longitudinal studies confirm the finding of previous reviews. The duration of computer use was more consistently associated with hand-arm than with neck-shoulder symptoms and disorders [...] In general, the dose-response analysis for hand-arm symptoms showed an increase in point estimates over an increasing duration of mouse-use." (Should office workers spend fewer hours at their computer? A systemic review of the literature);

- "All prospective studies that measured extent of computer use found a positive association between computer work and upper extremity musculoskeletal symptoms."

- (Musculoskeletal disorders of the upper extremity associated with computer work: A systemic review);

- "The findings confirmed that computer related health disorders such as carpal tunnel syndrome, stress, computer vision syndrome, and musculoskeletal disorders occur simultaneously among prolonged computer users such as employees and students [...] The line graph in figure 6 clearly shows that computer users who use computer more than four hours daily indicated symptoms of all four categories of computer related health disorders." (Computer users at risk: Health disorders associated with prolonged computer use);

- "When operating a keyboard, repetitive key entry (50,000-200,000 keystrokes per day) may cause irritation to the membranes surrounding the extensor tendons (synovial sheaths) or the tendons themselves. Moving the fingers repetitively while the wrist is flexed, extended, or ulnar-deviated can cause the flexor tendons to move past and against the walls of the carpal tunnel [...] Among the studies conducted on newspaper employees, Burt et al. found an increased risk of elbow/forearm MSD symptoms with an increasing percentage of the time spent typing on a computer keyboard." Risk Factors for Musculoskeletal Disorders Among Computer Users

The WCB must do medical/scientific literature reviews on a regular basis to inform their ASTD policy. To use the hand-wrist tendinopathy policy as an example, the WCB may find that there are frequently repeated motions but no awkward postures or force, so the ASTD is found to be unrelated to work activities. In contrast, current medical/scientific research might demonstrate that prolonged repetition alone is causally related to the development of ASTDs. There needs to be change in the ASTD criteria used so that it accurately reflects what the current medical/scientific research demonstrates.

It would also be helpful to establish an Occupational Disease and Injury Advisory Committee that would review occupational diseases and ASTDs and provide advice on emerging trends in medical science.

Professional ergonomic assessments at the beginning of claim adjudication would assist in getting it right the first time NS should be a requirement for all computer-related ASTD claims. Precise measurement is needed with these types of claims to avoid forcing injured workers into the appeal system to have their claims accepted.

The WCB adjudicates the first diagnosis on the claim and then does not usually consider subsequent diagnoses for the same symptoms. This practice is problematic because initial diagnoses tend to change with further investigation and referrals to specialists. For example, if an injured worker sees their doctor about wrist pain, the first diagnosis is likely to be a wrist sprain/strain. Then when the symptoms do not subside, the doctor refers them to a specialist or for imaging and the diagnosis may be clarified. In these situations, the WCB usually only considers the first diagnosis despite further medical evidence that the condition is being further investigated. If the claim is denied for a wrist sprain/strain then the worker must specifically request adjudication of the new, clarified diagnosis despite the symptoms remaining the same since the start of the injury.

Problems also arise if, as an example, a wrist sprain/strain is accepted on the claim and then deemed resolved despite further medical investigation clarifying the diagnosis. The WCB will deny further benefits because they have not accepted the clarified diagnosis and continue to deem the sprain/strain resolved. The WCB often deems a condition resolved based on general guidelines for specific injuries, not on whether the injured worker continues to have the same symptoms or not. This requires an appeal which can take several months and injured workers are forced to stop treatment if they cannot afford to pay out of pocket for treatment. This makes their condition prolonged or worse and delays a graduated return to work.

The adjudication of ASTDs should be consistent with the OH&S Regulation and OH&S Policies related to MSK injuries. For example, the WCB case manager should consider how long a worker is exposed to specific risk factors and if other workers in the same position have symptoms of ASTDs. These factors are usually not given any weight in the compensation side of things yet are clear indicators that need to be considered on the prevention side.

The WCB should also place more weight on treating physicians' notes regarding causation and not just simply ignore these notes. These notes are often ignored because the WCB reasons that the treating physician doesn't have enough understanding of the work duties involved. Most people know what repetitive typing and mousing looks like, so this is just another way that the WCB denies these types of claims unfairly. The culture at the WCB is to give minimal evidential weight to treating physician's notes and this needs to change where a treating physician is providing reasons and explanation for their opinions.

It is often the case that the WCB medical advisors state that the cause is related to other non-occupational factors, like diabetes or being a woman, despite evidence of repetitive computer use at work that makes symptoms worse. It would be helpful if the medical advisors were asked the correct legal test: whether work activities played more than an insignificant or trivial role in the development of the condition. Work activities need not be the sole cause or the most predominate but the WCB medical advisors often provide opinions based on this standard. A clear statement of the correct legal test in the RSCM II occupational disease policy might assist with this.

Medical advisors also fail to consider the susceptibility of some people to develop ASTDs even if the WCB's risk factor assessment, which has inherent problems as mentioned earlier, indicates insufficient risk factors present in employment. More attention in the policy to individual susceptibility for ASTDs might help with this problem.

The medical advisors also often ignore or give less weight to evidence that demonstrates a worker's ASTD condition is made worse by computer use and improves while being away from work-related computer use. This factor needs to be underscored in the policy so that this evidence is not minimized or ignored.

BULLYING AND HARASSMENT

Introduction

Another type of claim that is often denied by the WCB is mental disorders due to B&H. Psychological injuries as a result of B&H can be serious conditions that result in long-term disability. The WCB needs experts who are trained and educated to spot the often subtle and nuanced nature of B&H. Also, with the increased use of the internet, cyberbullying is an up and coming issue and the WCB needs to develop policies to adjudicate these types of claims.

Background

A case seen at MoveUP will be summarized and discussed in order to point out the problems with the WCB's adjudication of these types of claims. This case is being used because it is a good example of typical WCB reasoning in B&H cases.

A worker was disabled from working in November 2015 after being bullied at work in an office environment. She was ridiculed by a group of bullies in her workplace. There was an office incident that occurred in September 2015 where the bullies were standing near the worker's desk while she was on a difficult call with a client. They were looking at the worker and laughing while she was on the call.

When the call was finished, the main bully told the worker that she could have dealt with the call differently. An argument ensued during which the main bully was winking at a co-worker and smirking. Many people heard the argument and there was tension in the office. After work, around 9pm on the same day, the main bully posted a meme on Facebook and tagged the other bullies in it. The meme was labelled "hooooooooore" and said, "Don't mistake this fake smile and professional body language. I'd punch you in the throat if I knew I wouldn't lose my job." The post was liked by 15 people, including four co-workers. The worker believed the post was about her and what happened in the office that day. There were also other posts that referred to eavesdropping and hearing another person's phone call where all the bullies were tagged and commented on them.

Following this, there was tension between the worker and bullies. For example, they did not respond when the worker said "good morning" to them and they would usually ignore her. The worker felt uncomfortable taking calls for work because they could hear her, so she went to work in a private booth. Her manager told her to go back to her desk. By November 2015 the worker could no longer take being at work and went on sick leave. She was diagnosed with a psychological condition that a psychiatrist believed was the result of the B&H at work.

She reported the bullying to her manager while it was still happening but nothing much was done. The manager set up meetings between the bullies and the worker but that only allowed the bullies to turn the situation around and assert that the worker would interpret everything they did as being about her. This happened in a meeting on November 19, 2015. No investigation was started when she first reported, nor when she went off work on November 23, 2015. When the worker wanted to come back to work in January 2016 the employer refused to relocate her because they viewed the bullying incidents as a "personality conflict." No formal investigation was initiated until the worker sent a formal, written complaint to the employer almost one year later.

The employer's investigation determined that the threatening September 2015 Facebook post was about the worker but that the problem in the office was a personality conflict. The employer disciplined the main bully for her Facebook post.

Section 5.1 of the *Workers' Compensation Act* (the "*Act*") provides compensation to workers who have developed mental disorders due to a traumatic experience at work or a series of significant stressors, including B&H. The worker's claim falls under s. 5.1(1)(a)(ii), the B&H provision:

> **5.1** (1) Subject to subsection (2), a worker is entitled to compensation for a mental disorder that does not result from an injury for which the worker is otherwise entitled to compensation, only if the mental disorder
>
> (a) either
>
> (i) is a reaction to one or more traumatic events arising out of and in the course of the worker's employment, or
>
> (ii) is 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,
>
> (b) is diagnosed by a psychiatrist or psychologist as a mental or physical condition that is described in the most recent American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders at the time of the diagnosis, and
>
> (c) is not 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, to discipline the worker or to terminate the worker's employment.

After receiving legal advice to file a formal complaint to ICBC and to file a claim with the WCB, on November 16, 2016 she filed a claim with the compensation side of the WCB.

WCB Adjudication

To summarize, in order to have a mental disorder accepted as compensable by the WCB, an injured worker must meet the following criteria pursuant to the B&H provision:

1) Be exposed to B&H at work → there should be no question the worker was bullied at work;

2) The B&H must be the predominate cause of the mental disorder → A 2016 psychiatrist consult report fully supports that the worker had little to no prior psychological problems prior to the B&H at work and clearly had a mental disorder post B&H at work;

3) The mental disorder must be a DSM-5 disorder diagnosed by a psychiatrist or psychologist → Luckily, the worker had this requirement covered but many injured workers don't because they only see their GPs. A GP diagnosis is insufficient for the WCB's purposes. One can ask the WCB to refer the person for a psychological assessment to adjudicate the mental disorder, however, in our experience most of these WCB referred assessments appear biased, are non-supportive, and/or minimize the work incidents;

4) The "labour relations exclusion" (s. 5.1(1)(c) of the *Act*) basically allows the employer to do nothing in response to a B&H report and if doing nothing plays a role in causing the mental disorder, it is viewed as non-compensable by the WCB and the WCAT.

In a March 2017 decision, the WCB denied the worker's claim on the basis that the B&H incidents occurred over one year before she filed her claim. This involves s. 55 of the *Act* which provides that an injured worker has one year from the date of injury or date of disability (in occupational disease cases) to file for WCB benefits.

The WCB decision maker determined the dates of bullying incidents ended on October 8, 2015 and because the worker didn't file before October 8, 2016, her claim was not accepted. The decision maker also found that nothing precluded her from filing an appeal on time because there were no special circumstances in her case. Extensions of time to file an appeal, which are rarely allowed by the Review Division, can be applied for if there were special circumstances that precluded an injured worker from filing. Our position is that the November 19, 2015 meeting between the bullies and worker was the last incident in a series of stressors and as such she filed in time. It was also our position that the worker in this case was not aware that her psychological condition was the result of B&H until her psychiatrist noted it in the 2016 consult report. Finally, an argument could be made that the one-year timeline should start at the date of disability – in this case, November 23, 2015.

The WCB decision maker found that the employer's lack of action to deal with the B&H falls under the labour relations exclusion and, if this lack of protecting her was causative to her mental disorder, it is excluded because it is within the mandate of labour relations. Our position was that this is unacceptable in the context of clear OH&S law and Collective Agreement language that should have resulted in the employer eliminating or minimizing the work-place psychological harms. It was our position that failing to do an investigation for almost one year after the worker went off work constitutes egregious conduct that should not be protected under the labour relations exclusion.

Review Division Decision

The worker appealed the WCB's denial. The Review Division confirmed the denial on the basis that she was not exposed to B&H:

> In my view, regardless of who the posts were aimed at, they could be seen as immature, inappropriate, unprofessional, unpleasant, and in the case of the comment about physical violence, threatening. However, the post was made on X's social media site, it was not posted to the worker's site, it did not name the worker, it did not refer to a work situation. While I acknowledge the worker's subjective view that the posts were about her, in my view the evidence does not support the conclusion that the posts were aimed at the worker. […]
>
> The evidence does not show that X used inappropriate or threatening language, and I am not persuaded that X's comments to the worker were intended to, or should reasonably have been known would, intimidate, humiliate, or degrade the worker. (page 6)

Regarding the timeliness issue, the Review Officer found that she had filed within one year because if there are a series of stressors/incidents, the one-year timeline starts at the date of the last incident, which in this case was determined to be the November 19, 2015 meeting.

The Review Division decision failed to consider that the employer found that the Facebook post was about the worker. The Review Division failed to consider that B&H can be subtle and nuanced and the nature of online social media posts. The worker's psychologist, an expert in B&H, was able to define the conduct that occurred as classic bullying and cyberbullying conduct. The bully had tagged the other bullies and the post was visible to co-workers who were there on the day of the office incident. Witness co-workers said they saw the post and knew it was about the worker but did not like or comment on it.

WCAT Decision (A1800306)

For the WCAT, we provided a psychological opinion from the worker's psychologist who is an expert on work-place B&H. She provided labels for what occurred to the worker: mobbing and cyberbullying. She viewed the incidents as classic bullying and characterized the November 19, 2015 meeting as the bullies turning the tables and making it seem as if they were being targeted by the worker.

The WCAT recently denied the appeal. While the panel reasoned that bullying occurred with the Facebook post, they denied the appeal on the basis that the Facebook posts did not arise out of and in the course of employment because they did not happen at a time and place and during an activity consistent with or reasonably incidental to the worker's employment. The panel reasoned that the bullying was not in the course of employment because the Facebook post was on a private page and the post didn't need to be addressed by the worker as part of her employment obligations.

The WCAT did not agree that the employer's lack of action when the worker reported the conduct was not egregious and thus could be excluded under s. 5.1(1)(c) of the *Act*.

Problems with the Decisions

When the WCB gets B&H claims they often just rely on the employer's investigation instead of conducting their own investigation as soon as possible. The employer's investigation might downplay the behaviour and try to minimize what occurred so that they are not liable for violating OH&S law by not dealing with the B&H. In most cases, in order to have a chance of having B&H claims accepted, another investigation is needed to get the facts straight.

Often, worker representatives conduct another investigation and interview witnesses to ensure the investigation is not biased. One option may be to adopt standards for investigations that the WCB follows when adjudicating these types of claims. The purpose would be to ensure accurate facts about the workplace situation are being relied on.

Generally, it is unusual to see a case manager or other decision maker just accept what the worker tells them. It is usually the case that workers' evidence is given little to no evidential weight whatsoever. This is because of the culture at the WCB.Decision makers at the WCB should be accountable for their decisions. There doesn't appear to be any sort of oversight or accountability for decisions that are based on little to no evidence and appear to not give any weight to what the worker is saying. This needs to change.

If the culture changed at the WCB to place weight on what a worker is saying about their situation, there would be fairer outcomes for injured workers. Instead, their evidence is minimized and it usually results in unjust decisions.

The policy regarding B&H needs to be clarified so that the OH&S definition of B&H is consistent with the compensation definition. Currently, there is no definition of B&H on the compensation side and often WCB decision makers and WCAT panels believe there must be something threatening or abusive in the conduct for it to be considered B&H. In contrast, the OH&S definition of B&H is:

> A worker is bullied and harassed when someone takes an action that he or she knew or reasonably ought to have known would cause that worker to be humiliated or intimidated. When an employer or supervisor takes reasonable action to manage and direct workers, it is not bullying and harassment (see Prevention Policy D3-115-2 for more information).

Adopting the OH&S definition would allow for consistency among cases and consistency with s. 5.1(a)(ii). A clear definition of B&H, which is conduct that would cause a worker to be humiliated or intimidated, will limit the decision makers who believe B&H must include threatening and/or abusive behaviour. It is also reasonable that both sides of the *Act* are consistent.

The WCB needs to stop referring injured workers to psychologists who appear biased in their opinions. This is yet another commonly used strategy by the WCB to deny these types of mental disorder claims. This is based on MoveUP's experience with multiple B&H claims. It is prudent for psychologically injured workers to seek out external psychological treatment in addition to the WCB provided assessment/treatment so that there can be independent psychological evidence to rely on if a decision needs to be appealed. This advice comes from years of witnessing the same types of psychological opinions that come from WCB referred psychologists. The fact that injured workers need to seek out independent psychological assistance in order to have a chance of claim acceptance is striking and demonstrates yet another unfair WCB area.

Also problematic are the majority of WCB Medical Advisors (BMA) opinions. These doctors do not have an obligation to do what is in the best interest of the injured worker because the workers are not their patients. In contrast, when a student becomes a doctor they must take an oath to provide medical care that is in the best interest of their patients (ex: Hippocratic oath). The medical advisors do not have this obligation, they do not physically assess injured workers when providing opinions, and the perception is that the WCB has "hired guns" that can provide the evidence necessary to unfairly deny claims. The fact that an injured worker needs to get an expensive, independent medical-legal opinion just to have a claim accepted is simply unreasonable and not in the spirit of the great compromise set out in the Meredith principles of Workers Compensation systems. Also, if represented by a lawyer, the WCAT expects independent medical evidence to be obtained to support an appeal.

Then the WCAT only reimburses up to a fraction of what was paid (pursuant to WCB BCMA Fee Schedule) unless one can argue for full reimbursement. Most injured workers will not appeal denials of benefits because they see a BMA opinion and think there is no way to win. Often, medical professionals avoid dealing with the WCB and won't provide medical-legal opinions without a lawyer's involvement. Surely this has resulted in countless workers giving up entitlement to benefits despite having meritorious claims. This is simply a cost saving mechanism for the WCB. It is striking to note that on the backs of injured workers being denied benefits the WCB has enjoyed surpluses, which end up going back to employers year after year.

With respect to the one-year timeliness issue, WCB policy should clarify that in B&H and other mental disorder claims, the one year starts at the date of the last significant stressor incident, disability, or the date a DSM-5 diagnosis is made. To make it consistent with occupational diseases, the date of disability would be a clear date to work with. Many workers who are bullied and harassed to the point of leaving work are in shock and are confused about whether their injury could be a WCB claim. For these reasons, the deadline for B&H claims should be as generous to workers as possible.

The predominate cause test under the B&H provision has a higher causation threshold than physical injuries. If a worker is physically injured or suffers a traumatic event that results in mental disorder, the legal test for causation is causatively significant. This means that if the work incident played more than a trivial or insignificant role in the development of the condition it is compensable. Changing the predominate cause test would require a legislation change. There are also Human Rights and Charter implications with having a different causation test for people with mental disorders.

The WCB also needs to conduct a scientific literature review on what experts have to say about B&H. Related to this, the WCB should have specialized case managers who have received training related to B&H and are able to spot classic B&H scenarios, like mobbing and cyberbullying. If decision makers are uneducated about the issue they are adjudicating, it makes for unjust decisions. As an example, the psychologist in the case example was able to define interpersonal conflict and how it differed from bullying. She also determined the exact point when the conduct turned into bullying (when the bully was winking at someone behind the worker and smirking during their argument). This type of expertise is necessary in the adjudication of B&H claims.

In light of the WCAT decision noted above, a separate policy should be in place for cyberbullying cases. In that WCAT decision, the threatening Facebook post was about the incident at work – even the employer determined this. The post itself referred to throat punching someone if they weren't at work. However, the WCAT found that, because the post was made after hours, not on a work computer, and the worker didn't have to see it for work, it did not arise out of and in the course of employment. With this type of reasoning, any cyberbullying activity stemming from the workplace could be denied if the activity occurs after hours on home computers. Given that most employers place some limits on the use of the internet during work hours or on employer-provided devices, almost no cyberbullying would meet these criteria even when the bullying directly relates to the worker's employment. These cases will be growing in number and taking an increasing toll on workplace health. The WCB needs to provide guidance to decision makers on how to adjudicate them.

As for the labour relations exclusion under s. 5.1(1)(c) of the *Act*, when an employer violates the requirements under s. 115 of the *Act* to ensure a healthy and safe work environment or the WCB's B&H policies (D3-115-2), the compensation side should not automatically exclude those acts as being labour relations. If non-action by the employer in response to B&H complaints impacts a worker's mental health as much as the B&H itself, the WCB should not be able to deny the psychological condition because the non-action fits under the labour relations exclusion.

Non-action is in direct violation of OH&S law and should not be viewed as labour relations. Again, the *Act* should be consistent on both the compensation and prevention side.

GENERAL WCB CHANGES

A worker centered approach means that the WCB believes what injured workers tell them and adjudicates claims fairly. In order to ensure this, there must be accountability on decision makers for their decisions. There should be a mechanism to investigate whether a decision maker is acting unfairly. Interest should be payable to a worker when they win their entitlements on appeal. Interest should be payable from the date that the initial entitlement decision was made. This would increase accountability on decision makers to make fairer, more evidence-based decisions. Generally, the WCB should place more evidential weight on what workers have to say about their conditions.

The strict 90-day appeal deadline prevents many workers from appealing decisions. The deadline to appeal should be one year so that injured workers have more of a chance to obtain benefits they may be entitled to. Also, in communicating decisions, the effect that each decision has on a worker's entitlements should be explicitly set out so injured workers have a clearer understanding of what is at stake in each decision. Currently, many workers do not understand how WCB decisions effect their entitlements and whether they should appeal specific decisions. Extensions of time should be allowed more often and in cases where a worker does not understand what entitlements flow from certain decisions.

Permanently injured workers should receive their permanent functional impairment pensions for life. In this day and age people have to keep working past the age of 65 to survive. Changing the pension duration for life would assist in a fairer WCB system. An alternative to pensions for life may be a change to pension policy so that injured workers can extend their pensions based on their pre-injury intention to retire instead of the strict evidential requirements set out in the current policy. For example, the policy requires that financial plans and other "independently verifiable" evidence be relied on to extend a pension. Most people do not have the required evidence so often lose the chance to have their pensions extended.

The WCB should speak with and consider what treating physicians have to say more often to determine entitlement decisions. Treating physicians physically assess and speak to their patients in providing care and this helpful information is often ignored by WCB decision makers. Medical review panels should be reinstated so that workers have a last resort and don't need to obtain expensive medical-legal opinions, psychological opinions, etc, in order to have fairer decisions.

There should be no statutory maximum for wage rate calculations because it limits the amount of wage loss benefits, pension amounts, and Vocational Rehabilitation obligations owed to injured workers.

Treatment needed to keep injured workers at work should be provided without having to keep appealing decisions. For example, one of MoveUP's members has a permanent arm condition from carrying and maneuvering a tablet for work and the WCB accepted the permanent arm condition but keeps denying continued acupuncture treatment. This is despite the family doctor's clear note that acupuncture a few times a month helps alleviate the work-caused symptoms in the worker's arms. The cost of appealing this decision surely outweighs the cost of providing acupuncture for a period of time and then reevaluating the issue from time to time. This would be consistent with s. 21(1) of the *Act* which provides that the WCB may cover health care treatment that alleviate the effects of the workplace injury. It would also be consistent with the WCB's practice of wanting to keep workers at work. Continued health care should not be so difficult to maintain via the WCB.

CONCLUSION

Computer-related ASTDs are denied more often than they are accepted, despite medical literature demonstrating a causal relationship between repetitive computer use and injury. The WCB's job site visits to assess ergonomic risk factors are inadequate and inaccurate. WCB medical advisor opinions are based on these inaccurate risk factor assessments. Ergonomists need to be a part of the risk factor analysis done at the WCB to ensure the evidence is accurate and complete. More consideration needs to be given to treating physicians' opinions about the cause of their patients' ASTDs. A separate Occupational Disease and Injury Advisory Committee should focus on computer-related ASTDs and keep WCB policies and practices consistent with the medical literature available.

B&H claims are another area of WCB claims that has a low acceptance rate. The WCB needs to do their own unbiased investigation into the B&H complaint and place more evidential weight on what the worker is saying about their own experience. Case managers should be trained on B&H and cyberbullying in order to assess the often subtle and nuanced conduct that constitutes B&H. Specialized and in-depth training with information from experts is needed. Policy needs to set out exactly when the one-year timeline in B&H cases starts and date of disability seems the most reasonable. Cyberbullying needs specific policies and employers' lack of action in investigating B&H complaints should be removed from the labour relations exclusion when adjudicating B&H claims.

Many changes are needed at the WCB to ensure it is a fairer system for workers than it has been since the legislative and cultural changes in 2002. Acknowledging and considering treating physicians' opinions in decision making is key and currently the WCB does not adequately consider this valuable information. Deadlines to appeal should be extended and extensions of time approved more often than they currently are. There needs to be accountability for decision makers and interest paid when decisions are overturned on appeal. The WCB needs to believe what workers say about their own conditions and place weight on this evidence. Injured workers have been stripped of their rights and entitlements by the WCB for long enough – it is time for meaningful change.