Presentation to the Manitoba WCB Review Consultation

Submitted on behalf of the Research Action Committee (RAC)
Ontario Network of Injured Workers' Groups (ONIWG)
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Thank you for the opportunity to participate in the Manitoba WCB Review and for your consideration of our submission. While our knowledge and experience are primarily based in Ontario, our contacts in Manitoba have shared that many of the issues brought forward today are basically the same in Manitoba.

Our main messages today are:

1. The workers compensation system works well for maybe 80% of workers who file a claim for a workplace injury or illness. For those workers with serious injuries or diseases, that end up with a life-long impairment or disability, the system often fails them. We need to better understand the system factors that influence long term outcomes for workers with serious, life altering injuries or diseases in order to improve the system for everyone.
2. That workers compensation has changed significantly over the last three decades. The focus has shifted to one of financial responsibility and efficiency, often at the expense of those workers most in need of support and compensation.
3. Cost shifting from WCB to provincial coffers in areas such as health care, income support, community services, and retirement has significant impact on the provincial budgets.
4. The deterioration of the Workers Compensation system has long term consequences on Occupational Health & Safety and for workers, their families, and our economy.

Introduction

The Ontario Network of Injured Workers' Groups (ONIWG) was founded in 1991 and since then has actively advocated on behalf of injured, ill, and disabled workers; this is done primarily on a systemic basis. We intervened in five Supreme Court of Canada cases that affected the rights of injured workers including the Martin & Laseur v Nova Scotia, which involved a Charter challenge to the strict limits to the Nova Scotia chronic pain regulation. We also routinely meet with senior levels of the Ministry of Labour, including the Minister of Labour and with senior management at the Ontario Workplace Safety & Insurance Board (WSIB) and participate in public consultations

on issues that affect injured workers. At these meetings, the Ontario Network of Injured Workers' Groups advocate for systemic change to benefit all workers and their communities.

Our group members are injured worker organizations in the province of Ontario. ONIWG is a democratically governed organization, with 22 member groups from all parts of Ontario. These individual groups also work closely with other groups and agencies in their individual communities in order to advance the interests of injured and disabled workers.

The ONIWG Research Action Committee (RAC) was formed in 2013 following an eight-year project, the Research Action Alliance on the Consequences of Work Injury (RAACWI)[1]. The RAC has been an active participant in workers' compensation research, policy, and administration discussions.

1. The workers compensation system works well for maybe 80% of workers who file a claim for a workplace injury or illness. For those workers with serious injuries or diseases, that end up with a life-long impairment or disability, the system often fails them. We need to better understand the system factors that influence long term outcomes for workers with serious, life altering injuries or diseases in order to improve the system for everyone.

Workers Compensation was first started in Canada in 1915 in Ontario. It was crafted by Sir William Meredith who led a Royal Commission looking into the issues and tabled his final report in 1913[2].

The principles that were the foundation of the system were;

- **Compensation as long as disability lasts**
- **Collective Liability / Employer pays**
- **No fault**
- **Independent Agency**
- **Non-adversarial**

These founding principles have been set aside in the move to reduce costs to employers and corporations.

Compensation as long as disability lasts

Very few workers receive compensation as long as the disability lasts, and for those that are able to receive financial aid long term, that is eliminated at the age of 65.[3]

The mandatory retirement age of 65 was struck down in 2006 as discriminatory. The realities of the economy have shifted. Many people continue to work past age 65 by choice or by necessity.

[1] https://raacwi.iwh.on.ca/index.htm
[2] https://awcbc.org/files/about-awcbc/meredith_report.pdf
[3] https://injuredworkersonline.org/wp-content/uploads/2021/03/ETompa_Disability-Trajectories_2017Nov24.pdf

This steadily increasing trend will likely continue due to the recent unprecedented cost-of-living increases.[4] [5]

Most workers make their financial planning decisions – mortgages, loans, kids' education costs, bills etc. - based on, in part, how long they intend to work. Many workers are living paycheque to paycheque. No one expects to get hurt at work, let alone to be hurt badly enough to be unable to work or to end up with a permanent injury and restrictions. Few thinks about the immediate financial crunch that will happen if they are injured at work. Fewer still understand the limitations on wage loss benefits that they will face because of the age 65 restrictions in the WC legislation.

There has been a significant increase in the number of older workers injured in the workplace. A workplace injury can leave them destitute in their "golden" years because of the legislated age discrimination.

Other provinces amended their legislation to allow wage loss benefits past age 65. Workers in BC and Alberta can get wage loss benefits past age 65 if there is evidence that they planned to retire at a later date.

Recommendation #1 - Manitoba needs to change the law. WCB wage loss benefits should be payable so long as the wage loss continues.

Collective Liability / Employer pays

With the introduction of experience rating in the 1980s and 90s, the principle of collective liability has been transformed to a focus on individual liability for each employer covered by workers compensation. As Marion Endicott writes in New Solutions: A Journal of Environmental and Occupational Health Policy, experience rating has perverse outcomes.[6]

Experience rating introduced a system whereby employers' payments to the Workers Compensation Board (WCB), as it was then called, were significantly adjusted based on the cost of injured workers' claims arising from their firms. It implemented hefty surcharges for high firm costs and lucrative rebates for costs below the industry average. Employers became highly incentivized to minimize the cost of claims to avoid huge surcharges and potentially gain major rebates.[7]

No fault

While the principle of no fault in workers compensation is still enshrined in law, we have seen many employers bringing in policies and practices that challenge this principle. One example is

[4] https://injuredworkersonline.org/wp-content/uploads/2025/11/Rights-Dont-Retire-Report.pdf
[5] https://www.cambridge.org/core/journals/the-economic-and-labour-relations-review/article/retirement-pension-poverty-among-injured-workers-with-longterm-workers-compensation-claims/2EF00B2F686147ACE75BB22A7A8C710B
[6] https://journals.sagepub.com/doi/10.1177/10482911251314183
https://injuredworkersonline.org/issue/experience-rating/
[7] https://journals.sagepub.com/doi/10.1177/10482911251314183

a major national employer that penalizes its workers for a workplace injury, citing the worker didn't follow policy that led to the injury.

Another example is the use of pre-existing policies by workers compensation to deny benefits, even though the worker was able to do their job before the workplace accident.[8]
And as experience rating took hold in workers compensation across the country, a flurry of consultants sprung up offering service to corporations to challenge claims by their workers with the goal of reducing costs.

Independent Agency

The independence of workers compensation boards across Canada is now in question. Whether it's the huge financial rebates to corporations, or the unwillingness to listen to the treating physicians for workers with an injury or illness, it seems the corporate lobby has captured the workers compensation system. The Report, Prescription Over Ruled by the Ontario Federation of Labour and ONIWG, documents workers compensation systematically ignores the advice of medical professionals[9].

This corporate lobby has successfully worked to influenced policy and practice at the WCBs to create more barriers for workers seeking their rightful benefits.[10]

Non-adversarial

Research from the Institute for Work and Health, the leading research institute in English Canada focusing on workplace injury and workers compensation, has documented that the interaction between the WCB case manager and the injured worker has caused mental illness in many workers that they are there to serve.[11] Many workers experience an adversarial relationship with the WCBs where they are questioned repeatedly to verify their injury and its impact ongoing.

"Findings from this synthesis support the growing consensus that involvement in compensation systems contributes to poorer outcomes for workers. Interactions between insurers and injured workers were interwoven in cyclical and pathogenic relationships, which influence the development of secondary injury in the form of psychosocial consequences instead of fostering recovery of injured workers. This review suggests that further research is required to investigate positive interactions and identify mechanisms to better support and prevent secondary psychosocial harm to injured workers".[12]

[8] https://injuredworkersonline.org/issue/workers-benefits/pre-existing-conditions/
[9] https://ofl.ca/wp-content/uploads/2015.11.05-Report-WSIB.pdf
[10] https://injuredworkersonline.org/issue/surveillance-and-stigma/

[11] https://www.iwh.on.ca/journal-articles/association-between-case-manager-interactions-and-serious-mental-illness-following-physical-workplace-injury-or-illness-cross-sectional-analysis-of-workers-compensation-claimants
[12] https://link.springer.com/article/10.1007/s10926-014-9513-x

At the same time the workers compensation system can cast suspicion on injured and disabled workers. Professor Joan Eakin has documented this issue in her article: The Discourse of Abuse in Return to Work: A hidden epidemic of suffering.[13]

This discourse of abuse can result in a toxic dose of system problems as documented by Professor Ellen MacEachen[14]. And as a lead article in the Toronto Star documents, this policy and practice can end up with chronic unemployment with little or no ongoing benefits from the workers compensation system.[15]

2. That workers compensation has changed significantly over the last three decades. The focus has shifted to one of financial responsibility and efficiency, often at the expense of those workers most in need of support and compensation.

Injured and Disabled Workers with serious, permanent disabilities regularly end up unemployed with little or no benefits from the WSIB. Most of them return to work after their initial injury but often this employment is not sustainable.[16]

Research from South of the border identifies significantly higher rates of suicide and overdose deaths among injured workers.[17]

The Return-to-Work process has become an area of significant conflict with "forced" return to work becoming far too common. While the vast majority of workers have told us their priority is to return to work, pushing workers back to work before they have healed has led to further injury and disability. In our letter of 2016, we lay out our concerns and offer recommendations to safeguard workers from further injury.[18] [19]

3. Cost shifting from WSIB to provincial coffers in areas such as health care, income support, community services, and retirement has significant impact on the provincial budget.

Over the last 15 years, we have seen a radical shift at the WSIB as they have focused on cost containment and reducing costs to businesses and corporations. A 2024 news release from the

11https://www.academia.edu/1546220/The_discourse_of_abuse_in_return_to_work_A_hidden_epidemic_of_suffering

[14] https://pubmed.ncbi.nlm.nih.gov/20140752/

[15] https://www.thestar.com/news/canada/wsib-policy-pushes-hurt-workers-into-humiliating-jobs-and-unemployment-critics-say/article_42a6ca11-e8fd-5ab4-b9c3-e2e3ea16a4c3.html
https://injuredworkersonline.org/issue/return-to-work/

[16] https://injuredworkersonline.org/wp-content/uploads/2018/03/ONIWG_IW-unemployment_Feb2018.pdf

[17] https://www.bu.edu/sph/news/articles/2019/workplace-injuries-contribute-to-rise-in-suicide-overdose-deaths/#:~:text=Workplace%20Injuries%20Contribute%20to%20Rise%20in%20Suicide%2C%20Overdose%20Deaths.,increased%20opioid%20addiction%20and%20suicide."

[18] https://injuredworkersonline.org/wp-content/uploads/2017/02/Ltr_ONIWG_20160721_BetterAtWork.pdf

[19] https://injuredworkersonline.org/issue/return-to-work/

WSIB to Ontario employers noted a savings to corporations of over $18,600,000,000 since 2017.[20]

This has meant that thousands of workers[21] with work acquired permanent injuries and illnesses each year are being left with little or no financial support or health care from the WSIB. These are workers that have their claims accepted by the WSIB.

The fact that the WSIB discontinues the long-term support to these workers and their families causes these costs to be shifted into the public sector. Many of these families end up in poverty[22] and in ill health forcing them to rely on publicly funded services; health care, welfare, and social services. A study undertaken by Street Health in Toronto found that 57% of the homeless people surveyed had a work injury or illness.

There has not been a comprehensive study on the total impact of this cost shifting from the Ontario WSIB to the public purse, but it may be in the range of $2 Billion a year.

Another aspect of this cost shifting is the issue of claims suppression by employers. Research completed in Ontario, British Columbia and Manitoba have found high levels of non-reporting of injuries and diseases to their respective workers compensation boards. The 2022 report from BC estimated that 40 – 50% of injuries and illnesses are not reported.[23]

If we factor the costs to these workers and their families, that should be funded through workers compensation system, we could be looking at an additional - $1-3 Billion annually.

Recommendation #2 - To commission an independent study to determine the scale of cost shifting from the WCB to publicly funded programs.

One of the ways that the WSIB reduces their long terms costs is through the process of "deeming" workers to have earnings they don't have. We have brought this issue forward to the United Nations under the Convention on the Rights of Persons with a Disability (CRPD)[24]

[20] https://www.wsib.ca/en/news-release/wsib-pumps-over-2-billion-back-economy-2025-average-premium-rate-reduction-and-surplus

[21] According to the WSIB 2022 Annual Report, there were 95,218 lost time claims registered in that year.

[22] Peri Ballantyne et al., "Poverty Status of Worker Compensation Claimants with Permanent Impairments," *Critical Public Health* 26, no. 2 (2016): 173-190. https://www.researchgate.net/publication/275952209_Poverty_status_of_worker_compensation_claimants_with_permanent_impairments

[23] Claim Suppression: The Elephant in the Workplace – Report to the Board of Directors, BC Workers' Compensation Board, March 9, 2022

[24] Available at: https://injuredworkersonline.org/wp-content/uploads/2019/09/ONIWG_Submission-22nd-Session-CRPD_2019.pdf.

Recommendation #3 – Ensure that the WCB compensate workers and their families for the actual losses they experience and stop the subsidizing WCB with public dollars.

4. The deterioration of the Workers Compensation system has long term consequences on Occupational Health & Safety and for workers, their families, and our economy

Occupational injuries and illness can create significant costs to workers, their families, and our public services. Professor Peri Ballantyne did a survey of 492 workers with a permanent disability in conjunction with the Ontario WSIB. In her letter to the survey respondents in 2010, she shared some of the results of the study. She wrote:

75% of said your health is somewhat or much worse than it had been the day before your workplace accident. Fifty percent of you reported that most days are currently quite a bit or extremely stressful, with work or lack of work being a major stressor for 55% and 56% of you, respectfully. Of concern to us is that 77% and 73% of you indicated that your personal health or your financial circumstances were the major sources of stress in your life.

In terms of chronic health conditions, what stood out to us was the following:

- *55% reported a diagnosis of back pain – for 83% this diagnosis was made after your workplace injury*
- *49% reported a diagnosis of nerve pain – for 94% this diagnosis was made after your workplace injury*
- *44% reported a diagnosis of a mobility impairment – for 96% this diagnosis was made after your workplace injury*
- *42% reported a diagnosis of repetitive strain injury (RSI) – for 89% this diagnosis was made after your workplace injury*
- *41% of you reported a diagnosis of arthritis – for 72% this diagnosis was made after your workplace injury*
- *40% reported a diagnosis of depression – for 80% this diagnosis was made after your workplace injury*
- *39% reported a diagnosis of musculo-skeletal pain – for 92% this diagnosis was made after your workplace injury*
- *26% reported a diagnosis of high blood pressure – for 65% this diagnosis was made after your workplace injury*

In addition to the above diagnosed problems, many of you reported the following additional difficulties:

- *74% of you reported having problems sleeping*
- *69% of you reported having numbness in the limbs*
- *66% of you experienced stigma as an injured worker:*
    - *from a co-worker (69%),*
    - *from a work supervisor (61%)*
    - *from WSIB staff (60%)*
    - *from a medical doctor (31%)*
    - *from a prospective employer (26.5%)*
- *48% reported having problems concentrating*

- *38% of you reported having an anxiety problem*

In terms of health care, we note that 36% of you had been hospitalized during the 5 years prior to your completion of the survey – 63% of you as a result of your workplace injury. Twenty-three percent of you reported having been hospitalized during the year before you completed the survey – a third of these hospitalizations were reported to be the result of workplace injuries. Despite the complex health conditions reported, 17% of you had no contact with a general practitioner or family doctor 'in the past year' (in the year prior to the survey).

Forty percent of you indicated that during the past 12 months, you had experienced a need for health care that you were unable to receive;

- *78% of you reported that in the past 12 months, you needed but did not get treatment for a physical health problem*
- *24% needed but did not get treatment for an emotional or mental health problem.*

Eighty percent of you reported using medications on a regular basis (at least once a week), and 61% reported regularly using 4 or more medical drugs. Twenty-three percent of you indicated that in the past 12 months, you had been unable to get medications, or used them less often than directed (25%), because of the cost. Forty-one and a half percent of you indicated you did not use a medication you were directed to use, because of the side-effects.

Since the workplace injury, 40% of you reported having experienced period(s) of unemployment. At the time the survey took place, 55% of you reported being currently employed (mostly in a single job rather than multiple jobs; about half in the same or a very similar job to the pre-injury job; and about half of you with the pre-injury employer).Thirty eight percent of you reported being currently unemployed, with a large proportion of you (78%) indicating that a health condition or disability affects your current ability to look for work.

You can clearly see that most of these workers with serious, lifelong injuries and diseases were in need of ongoing health care and income support. Much of these costs are being covered in our public services.

Along with the suffering of these workers and their families, there is a loss to our economy. At a time when there are labour shortages across Canada, so many of these workers who have existing skills and work experience are left behind. According to StatsCan, there are over 1,000,000 people with a work acquired disability in Canada. If 40% of these are unemployed, that is 400,000 workers making up part of that labour shortage.

What is then the impact of loss income tax revenue? Assuming average income tax at $15,000 per worker, that translates into $6 Billion annual loss revenue that could be available to the provincial & federal budgets.

What makes this even worse is the long-term consequences to all of us. As the WSIB makes the system less costly to corporations, they have less of an incentive to invest on occupational health

and safety (OH&S). The result is an increase in workplace injuries and diseases. Lost time claims rose by 151% between 2019 and 2023.[25]

Along with this major increase in injuries and illness, we are seeing a high incidence of not reporting injuries to the WSIB (as noted previously). This lack of reporting and documenting these accidents is counter to good OH&S practices which based their risk abatement practices on reported injuries and illnesses. No injuries reported, no corrective action taken, more injuries to follow.

You can see this is a worsening problem for all of us.

Recommendation #4 – Institute a public awareness campaign to encourage the reporting by workplace parties of all injuries or diseases that may be work related.

Recommendation #5 – Establish an independent agency to track long term outcomes for workers with permanent disabilities and their families.

Occupational diseases are one of the most pressing issues in need of reform in workers compensation.

On July 7, 2020, Dr. Paul Demers of the Occupational Cancer Research Centre (OCRC) released a report highlighting occupational cancer and WSIB claims. The report[26] reveals that a disproportionate number of workers are denied occupational cancer claims in Ontario compared to other European countries. As a result, workers and families in need of services and support are left without the benefits they deserve.

Dr Demers shares in this blog from Cancer Care Ontario, "Many people can't personally control what they're exposed to at work, or don't have the freedom to find a different job. They need support from employers and governments. We hope that the evidence we gather from research can inform regulations and policies that will ultimately make workplaces safer for everyone."[27]

In the Occupational Disease Landscape Review, Dr. Linn Holness concludes her report with the following points.[28]

1. The crucial link between exposures at work and symptoms of disease is often missed by employers, healthcare providers and workers themselves. This matters to prevention efforts and accurate diagnosis and health management.
2. The Ontario health and safety system and the healthcare system are not well connected. Workers must navigate between the work and healthcare landscapes on their own. Yet

[25] WSIB Annual Report 2022
[26] https://www.occupationalcancer.ca/wp-content/uploads/2020/07/Final-Report-Using-scientific-evidence-and-principles-to-help-determine-the-work-relatedness-of-cancer-Final-April2020.pdf
[27] https://www.cancercareontario.ca/en/node/57876
[28] https://www.ontario.ca/document/occupational-disease-landscape-review

work can impact health, and health can impact work. Understanding this dynamic and intervening early is crucial at both the individual and system levels.

Recommendation #6 It is critical that workers compensation address the issue entitlement to and prevention of Occupational Disease to prevent further suffering of workers and their families due to the increasing exposure to toxins in the workplace.

We would be pleased to discuss or expand on any aspects of our submission if you would like.

Supplementary to our Presentation to the Manitoba WCB Review Consultation

Research Action Committee (RAC)
Ontario Network of Injured Workers' Groups (ONIWG)
Steve Mantis, RAC Chair
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March 24, 2026

Greetings,

As a supplementary to our submission, we are sending along a few documents for your consideration.

1. Bill 86, the Meredith Act. Bill 86 was introduced into the Ontario Legislature late last year by the Official Opposition, sponsored by NDP critics for workers compensation, labour and the standing committee for government agencies.

2. Three reports from British Columbia.
   - New Directions, WCB Review 2019, Executive Summary
   - Restoring the Balance, A Worker-Centred Approach to Workers' Compensation Policy, 2018
   - Experience Rating, Claim Suppression, and Disability Management: Workers Compensation at the Crossroads, 2024

Private Member's Bill	**Projet de loi de député**
MOTION FOR FIRST READING	MOTION DE PREMIÈRE LECTURE
MPP L. Vaugeois	Député(e) L. Vaugeois
I move that leave be given to introduce a Bill entitled	**Je propose** qu'il soit permis de déposer un projet de loi intitulé
"An Act to enact the Meredith Act (Fair Compensation for Injured Workers), 2025 and to repeal the Workplace Safety and Insurance Act, 1997"	«Loi édictant la Loi Meredith de 2025 sur l'indemnisation équitable des travailleurs blessés et abrogeant la Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail»
and that it now be read the first time.	et que ce texte soit maintenant lu une première fois.

…….
Bill no. N° du projet de loi

…….
First Reading Date Date de la première lecture

…….
Clerk's Signature Signature du greffier

Co-sponsors:	Coparrains :
MPP L. Vaugeois	Député(e) L. Vaugeois
MPP W. Gates	Député(e) W. Gates
MPP J. West	Député(e) J. West

Meredith Act (Fair Compensation for Injured Workers), 2025

EXPLANATORY NOTE

The Bill repeals the *Workplace Safety and Insurance Act, 1997* and enacts the *Meredith Act (Fair Compensation for Injured Workers), 2025*. The *Meredith Act (Fair Compensation for Injured Workers), 2025* establishes a scheme for compensating workers who have sustained a workplace accident or developed a workplace disease. The Act also contemplates the provision of services to assist injured workers with rehabilitation and retraining. The Act is to be administered by the Workers' Compensation Commission of Ontario. A Tribunal, known as the Workers' Compensation Appeals Tribunal of Ontario, is established to hear disputes arising from the administration of the Act. Provisions respecting the transition between the two Acts are provided for.

Bill **2025**

An Act to enact the Meredith Act (Fair Compensation for Injured Workers), 2025 and to repeal the Workplace Safety and Insurance Act, 1997

CONTENTS

His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

PART I
INTERPRETATION, PURPOSES AND PRINCIPLES

Interpretation

1. (1) In this Act,

"Commission" means the Workers' Compensation Commission of Ontario continued under section 23; ("Commission")

"dependant" has the same meaning as in Part III of the *Family Law Act*; ("personne à charge")

"injured worker" means a worker who has been injured in a workplace accident or who has been afflicted by a workplace disease; ("travailleur blessé")

"regulations" means the regulations made under this Act; ("règlements")

"Tribunal" means the Workers' Compensation Appeals Tribunal of Ontario continued under section 38; ("tribunal")

"worker" means a person providing labour or services to an employer in the context of an employer-employee relationship; ("travailleur")

"workplace accident" means any incident that occurs while a worker is performing work for an employer and that results in harm to the worker that is not trivial in nature; ("accident du travail")

"workplace disease" has the meaning ascribed to it in subsection (3); ("maladie professionnelle")

"workplace injury" means an injury sustained in the context of a workplace accident. ("lésion professionnelle")

Employer-employee relationship

(2) For the purposes of this Act,

(a) an employer-employee relationship exists between a worker and an employer if both parties have entered into an employment contract, either written, verbal or implied; and

(b) an individual who performs work for an employer as a co-op student, apprentice, learner or volunteer is deemed to be in an employer-employee relationship with the employer.

Workplace disease

(3) A disease afflicting a worker is a workplace disease for the purposes of this Act if it is reasonable in the circumstances to conclude that the worker's working conditions were a significant contributing factor to the worker developing the disease, on the basis of,

(a) relevant scientific data and statistical evidence;

(b) information about what a worker may have been exposed to while performing work for the worker's employer; and

(c) a presumption that exposures are additive unless proved otherwise.

Permanently injured worker

(4) An injured worker is a permanently injured worker for the purposes of this Act if it is reasonable in the circumstances to conclude that the worker will be unable to resume performing the same work that the worker performed prior to the workplace injury or onset of the workplace disease because of the effects of the workplace injury or the workplace disease.

Fund

(5) The Commission shall maintain a fund into which is paid employer premiums. All compensation under this Act, expenses of the Commission and costs of administering this Act and any other payments required to be paid under or in relation to this Act shall be paid out of that fund.

Purpose

2. (1) In light of the historic trade-off in which workers relinquished their rights to pursue a civil claim through the courts in exchange for access to timely no-fault compensation for losses arising from workplace accidents and workplace diseases, the principal purpose of this Act is to provide compensation and benefits to injured workers and surviving family members of deceased workers and to assure the rehabilitation, education and training of injured workers and their family members.

Other purpose

(2) It is also a purpose of this Act to enable the collection and analysis of information about workplace health and safety, workplace injuries and workplace diseases and the dissemination of this information, including among the Government of Ontario, government agencies and other governments, as well as officers of health, coroners and the public.

Principles

3. The following principles shall be observed in interpreting and applying this Act:

1. Compensation must be proportionate to the degree of loss of earnings and intangible losses.

2. Compensation must be provided to injured workers quickly without the need for a civil claim.

3. The purpose of compensation is to, at a minimum, put injured workers in as close to a position as they would be in but for the workplace injury or workplace disease in order to prevent them from being a burden on their families, friends or the community at large.

4. All monies and assets of the Commission are to be considered a public trust for the benefit of current and future injured workers for the purposes of the common law and any other Acts.

5. Injured workers are to enjoy security of payment.

6. Compensation is to be paid to injured workers without regard to the fault or negligence of any person and without regard to an injured worker’s pre-existing medical condition, weakness or susceptibility to harm, whether known or unknown.

7. The administration of the compensation program and the system of appeals of compensation decisions shall be independent and free from interference from the executive branch of government, similar to the independence and freedom from interference from the executive branch enjoyed by the judicial branch.

8. Administration of the compensation program and the resolution of any disputes arising from the administration of the compensation program is the exclusive responsibility of the Commission and the Tribunal, respectively, both of which are independent.

PART II
COMPENSATION AND SECURITY OF EMPLOYMENT

Definition

4. In this Part,

"deceased worker" means a worker whose death is attributable to a workplace accident or a workplace disease.

Entitlement to compensation

5. (1) The Commission shall provide an injured worker with the compensation to which the injured worker is entitled under this Part and in the amounts determined under this Part.

Same

(2) Compensation shall be provided promptly to an injured worker.

Same

(3) For greater certainty, an injured worker's entitlement to a given type of compensation does not impact on the injured worker's entitlement to other types of compensation.

Notifications re entitlement

6. (1) An employer shall notify the Commission of a workplace accident or of the onset of a workplace disease of which the employer is aware as soon as reasonably possible in the circumstances.

Same

(2) Upon being notified of a workplace accident or the onset of a workplace disease, the Commission shall promptly forward a copy of the notice to,

(a) the relevant injured worker, if the Commission was notified by the employer;

(b) the relevant employer, if the Commission was notified by the injured worker; and

(c) the workplace health and safety committee or representative, if any.

Confidentiality

(3) The information contained in a notice shall not be disclosed by an employer, injured worker, workplace health and safety committee or workplace health and safety representative,

with the exception of information that may indicate the commission of an offence under the *Criminal Code* (Canada) or a violation of the *Occupational Health and Safety Act*.

OHSA violation

(4) The Commission shall forward any information contained in a notice that may indicate a violation of the *Occupational Health and Safety Act* to the Ministry of Labour, Immigration, Training and Skills Development.

Offence

(5) If the information contained in a notice may indicate the commission of an offence under the *Criminal Code* (Canada), the Commission shall promptly determine if there are reasonable grounds to believe that the offence has been committed and, if there are, shall promptly forward the information to the appropriate police service.

No reprisal

(6) No person shall take any measure that would adversely affect an individual because the individual provided information about someone's possible entitlement to compensation under this Act.

Notification to police

(7) If the Commission becomes aware of a person having taken a measure described in subsection (6), the Commission shall refer the matter to the appropriate police service.

Disclosure by committee or representative

(8) A workplace health and safety committee or a workplace health and safety representative may disclose information to the Commission about a possible workplace accident or workplace disease that may give rise to entitlements under this Act, despite anything to the contrary in the *Occupational Health and Safety Act*.

Lost earnings

7. (1) An injured worker is entitled to compensation in the form of payments representing the injured worker's lost earnings during a given period resulting from the workplace injury or workplace disease.

Amount of lost earnings

(2) Payments representing lost earnings for a period of time shall be in the amount equivalent to 90 per cent of the amount calculated by,

(a) determining the worker's deemed income for the period;

(b) subtracting from the worker's deemed income for the period any earnings from work; and

(c) subtracting from the amount determined under clause (b) any tax that would be payable if the compensation were income from work.

Deemed income

(3) The worker's deemed income for a period of time shall be determined on the basis of an assumed annual income of the greater of the following amounts:

1. The total amount of earnings from employment as declared in the worker's tax return filed for the year preceding the period in question.

2. The average amount of earnings from employment as declared in the worker's tax returns filed for the five years preceding the period in question.

Tax returns not filed

(4) If the worker has not filed a tax return for the previous year, the Commission shall,

(a) provide interim benefits at a rate calculated by the Commission;

(b) promptly offer assistance to the injured worker to file tax returns; and

(c) promptly refer the worker to a list of qualified persons who may assist with the preparation of tax returns.

List

(5) The Commission shall maintain a list for the purposes of clause (4) (c).

Change to tax return

(6) In the event of a change to a tax return, the worker's deemed income shall be recalculated and the amount of payments in respect of lost earnings shall be recalculated accordingly.

Indexation

(7) If the worker is permanently injured following a workplace accident or the onset of a workplace disease resulting in a loss of earnings, the payment representing lost earnings shall be indexed to the Consumer Price Index maintained by Statistics Canada effective January 1 of each year, except the indexation shall not result in the amount of payments being reduced.

Regulations

(8) The regulations may provide for additional details about the manner in which payments representing lost earnings are to be indexed under subsection (7).

Notice to Commission

(9) The injured worker and the injured worker's employer shall inform the Commission of any changes to the injured worker's earnings within 30 days following the change.

Overpayment

(10) Any overpayment resulting from a recalculation under subsection (6) or a change in earnings referred to in subsection (9) constitutes a debt owed to the Commission and may be recovered by the Commission.

Cessation of payments

(11) Compensation representing lost earnings shall cease,

(a) once the injured worker's earnings are equal to or exceed the injured worker's deemed income;

(b) on the day on which the injured worker attains 70 years of age, if the worker was 65 years of age or older on the date of the workplace injury or the onset of the workplace disease, subject to subsection (12);

(c) on the day that is the fifth anniversary of the date of the workplace injury or onset of the workplace disease, if the worker was 65 years of age or older on that date, subject to subsection (12); or

(d) the day on which the worker is no longer impaired as a result of the workplace injury or workplace disease.

Same

(12) In the situations described in clauses (11) (b) and (c), compensation representing lost earnings shall cease at a later date determined by the Commission if the Commission is of the opinion that, based on the evidence before it, the worker would have continued to work at least until that later date determined by the Commission.

Interim compensation

8. (1) If the Commission is unable to determine a worker's entitlement to compensation in the form of payments for lost earnings within 15 days after having received information notifying the Commission of the worker's potential entitlement, the Commission shall provide interim compensation until the worker's entitlement is established.

Same

(2) Interim compensation under subsection (1) is not recoverable by the Commission except in cases of fraud resulting in a conviction of an offence under the *Criminal Code* (Canada).

Compensation in kind

9. (1) An injured worker is entitled to compensation in the form of the payment of insurance premiums, for the benefit of the injured worker and, if applicable, the injured worker's dependants, necessary to maintain at least the same health insurance coverage that the injured

worker and their dependants benefitted from at the time of the workplace accident or the onset of the workplace disease.

Cessation of payment of insurance premiums

(2) Payment of insurance premiums for the benefit of the injured worker and, if applicable, their dependants shall cease,

(a) once the injured worker returns to work;

(b) at the moment at which the injured worker would have ceased to be a member of the insurance plan because of retirement; or

(c) once the injured worker's employer-employee relationship is severed in accordance with this Act.

Non-taxable benefits

(3) If the injured worker was receiving non-taxable benefits as part of their compensation from the employer, the employer shall continue to provide such non-taxable benefits for the duration of the injured worker's employment until the worker returns to work.

Pension contributions

10. (1) An injured worker is entitled to compensation in the form of pension contributions paid on behalf of the injured worker to any employer pension plan of which the injured worker is a member.

Cessation of contributions

(2) Pension contributions paid on behalf of the injured worker cease,

(a) once the injured worker stops receiving compensation representing lost earnings;

(b) on the day on which the injured worker attains 70 years of age, if the worker was 65 years of age or older on the date of the workplace accident or the onset of the workplace disease, subject to subsection (3); or

(c) on the day that is the fifth anniversary of the date of the workplace accident or the onset of the workplace disease, if the worker was 65 years of age or older on that date, subject to subsection (3).

Same

(3) In the situations described in clauses (2) (b) and (c), pension contributions on behalf of the injured worker shall cease at a later date determined by the Commission if the Commission is of the opinion that, based on the evidence before it, the worker would have continued to work at least until that later date determined by the Commission.

CPP contributions

11. (1) Subject to the *Canada Pension Plan* or any other federal statute, an injured worker is entitled to compensation in the form of Canada Pension Plan contributions paid on behalf of the injured worker.

Cessation of contributions

(2) Canada Pension Plan contributions paid on behalf of an injured worker cease,

(a) once the injured worker stops receiving compensation representing lost earnings; or

(b) once the injured worker begins receiving Canada Pension Plan payments.

Commission pension plan

12. (1) The Commission shall establish a pension plan for which permanently injured workers without an employer pension plan are eligible and shall pay compensation to such injured workers who opt in to the pension plan in the form of pension contributions equal to at least 17 per cent of the injured worker's lost earnings.

Payments out of the plan

(2) Payments to members of the pension plan shall be paid monthly and shall commence once the member stops receiving compensation in the form of payments for lost earnings due to their age.

Transfer to Commission's pension plan

(3) If the employment relationship between an injured worker and the injured worker's employer is severed by declaration of the Tribunal under this Act and if the injured worker was a member of a pension plan by virtue of their employment, the commuted value of the pension shall be transferred to the Commission's pension plan and the Commission, acting in the stead of the employer, and the injured worker shall continue to contribute to the plan as the employer and injured worker would have contributed to the employer's pension plan had the workplace injury or workplace disease not occurred.

Conflict

(4) In the case of a conflict between subsection (3) and the *Insurance Act* or any other Act, subsection (3) prevails.

Intangible loss, pain and suffering

13. (1) A permanently injured worker is entitled to compensation in the form of payments for intangible loss, pain and suffering.

Same

(2) The compensation under subsection (1) shall be considered compensatory and not remedial.

Amount of compensation

(3) The Commission shall determine the amount of compensation to which an injured worker is entitled, which must be proportionate to the degree of loss or suffering of the injured worker, including the physical losses experienced by the injured worker, the pain experienced by the injured worker, all physical and mental sequela and any other relevant social or contextual factors.

Cessation of payments

(4) Compensation under subsection (1) shall only cease once the pain, suffering or loss associated with the workplace injury or workplace disease itself ceases.

Benefits to dependants or estate

14. (1) If a workplace accident or workplace disease results in the death of a worker, the Commission shall pay to the deceased worker's dependants or, in the absence of any dependants, to the deceased worker's estate reasonable and customary funerary expenses.

Same

(2) If the deceased worker has dependants, the deceased worker's dependants are entitled to,

(a) compensation in the form of payments for lost earnings for the period determined by the regulations;

(b) education, training or retraining, as if the dependant were a permanently injured worker, to enable the dependant to earn a living equivalent to that of the deceased worker; and

(c) payment for intangible loss, pain and suffering equivalent to the deceased worker's deemed annual income for the purposes of subsection 7 (3).

Volunteers, etc.

15. In the case of an injured worker or a deceased worker who is or was not remunerated, the Commission shall impute a reasonable amount of income to the injured worker for the purposes of determining the injured worker's entitlement to compensation under this Part or the deceased worker's dependants' entitlement to compensation under this Part.

Security of employment

16. (1) An injured worker's employment shall not be considered to have been interrupted, suspended or terminated for the sole reason that the injured worker has suffered a workplace injury or acquired a workplace disease and, for greater certainty, the injured worker's employer shall accommodate the injured worker up to the point of undue hardship, as required by the *Human Rights Code*.

Duty to accommodate

(2) For greater certainty, a dispute between an injured worker and their employer as to the injured worker's terms of employment or accommodation or what constitutes undue hardship in the circumstances shall not impact on the benefits payable by the Commission under this Act.

Mediation

(3) If the injured worker and their employer consent to it, the Commission may refer any dispute referred to in subsection (2) for mediation by a qualified independent mediator.

Commission's determination

(4) If a mediated settlement cannot be reached, the Commission may settle the dispute and issue a decision that is binding on the injured worker and the employer.

PART III
REHABILITATION AND TRAINING

Medical coverage

17. (1) For the purposes of this section, a diagnostic service, treatment, medication or medical device is medically appropriate if it is recognized as safe and effective by the relevant government agencies and professional colleges.

Payment

(2) The Commission shall pay for any medically appropriate diagnostic service or treatment for an injured worker if the service or treatment is not covered by the Ontario Health Insurance Plan.

Policies

(3) The Commission shall develop policies governing payments for medically appropriate diagnostic services and treatments for injured workers that are not covered by the Ontario Health Insurance Plan and update those policies at least once every three years.

Medication and medical devices

(4) The Commission shall cover the cost of any medically appropriate medication prescribed for an injured worker or medical device for an injured worker if it may assist the injured worker in, to the extent possible, regaining the same health status that the injured worker had prior to the workplace injury or the onset of the workplace disease.

Private insurance

(5) Despite subsection (4), if the cost of the medication or medical device is covered under a health insurance plan of which the injured worker is a member, the Commission is only required to cover the cost of any amount not covered by the health insurance plan.

Education and retraining

18. (1) The Commission shall provide a program of education and retraining to every permanently injured worker.

Purpose

(2) The purpose of a program of education and retraining is to put the injured worker in at least as good a position in the labour market as the injured worker was prior to the workplace injury or the onset of the workplace disease.

Development of program

(3) In developing a program of education and retraining for an injured worker, the Commission shall take into consideration labour market demand and the injured worker's aptitudes, abilities and preferences.

Labour market demand

(4) In assessing labour market demand, the Commission shall take into consideration the following:

1. Patterns of seasonal work of the injured worker.

2. All local or regional labour markets to which the injured worker may have access.

3. Any other factors, including economic, social or geographic factors, relevant to determining how best to place the injured worker in at least as good a position as the injured worker was in prior to the workplace injury or the onset of the workplace disease.

PART IV
APPEALS

Mandate

19. (1) The mandate of the Tribunal is to hear any disputes arising from the administration of this Act by the Commission, including disputes over any perceived delay in the Commission's decision-making and over whether any policy, guideline or practice established by the Commission is consistent with this Act.

Right of appeal

(2) An injured worker or an employer may appeal to the Tribunal any decision of the Commission affecting them.

Same

(3) In the context of an appeal under subsection (2), the injured worker or employer may challenge the validity of any policy, guideline or practice that has been established by the

Commission and applied in making the decision under appeal on the basis that it is inconsistent with this Act.

HRTO

(4) An injured worker may elect to appeal a decision made by the Commission under subsection 16 (4) to the Human Rights Tribunal of Ontario if the only dispute at issue concerns the duty to accommodate under the *Human Rights Code*.

Powers of Tribunal

(5) After giving the injured worker and the employer an opportunity to be heard, the Tribunal may do any of the following:

1. Order the Commission to do anything that the Commission is authorized to do under this Act, including to provide interim compensation under section 8.

2. Order that a policy, guideline or practice of the Commission is invalid and may therefore no longer be applied by the Commission.

Same

(6) If the dispute involves a matter under the jurisdiction of the Lieutenant Governor in Council, the Commission may only make recommendations to the Lieutenant Governor in Council.

Process for appeals

20. (1) If an appeal is commenced before the Tribunal, the Commission shall promptly send the following to the injured worker to whom the appeal relates or to their representative:

1. Any communication between a decision-maker and any other person that relates to the decision under appeal.

2. A copy of any document used by the decision-maker in reaching the decision and preparing the reasons for the decision, including any policy, guideline or practice relied on by the decision-maker.

3. Any other document or information in the possession of the Commission that is relevant to the decision under appeal.

Failure to provide

(2) Any failure to provide information under subsection (1) shall give rise to an adverse inference in favour of the injured worker.

Appeals respecting the duty to accommodate

21. (1) In an appeal respecting the duty to accommodate an injured worker under the *Human Rights Code*, the Tribunal shall accept the opinion of a qualified medical practitioner,

including any recommendations about workplace accommodations, as dispositive of the medical facts at issue.

Undue hardship

(2) If the Tribunal determines that the injured worker cannot be accommodated without undue hardship, the Tribunal may declare that the employment relationship has been severed without just cause, in which case the injured worker shall be paid such compensation as required by the agreement or agreements governing their employment, the common law or any applicable statute.

Interpretation

(3) Nothing in this Act shall be construed to prevent an injured worker from seeking a remedy in any other forum for alleged improper dismissal or to limit the remedies available to the injured worker in such a circumstance.

PART V
COMMISSION AND ADVISORY OFFICES

Definition

22. In this Part,

"personal information" has the same meaning as in the *Freedom of Information and Protection of Privacy Act*.

Commission

23. (1) The body corporate known as the Workplace Safety and Insurance Board is continued under the name Workers' Compensation Commission of Ontario in English and Commission de l'indemnisation des travailleurs de l'Ontario in French.

Powers

(2) The Commission has the capacity, rights and powers of a natural person for the purposes of carrying out its functions and may retain such officers and employees and such assistance as it considers necessary.

Auditor General

(3) The accounts of the Commission shall be audited by the Auditor General annually.

Commission's functions, including establishment of employers' premiums

24. (1) The functions of the Commission are to,

(a) administer this Act and ensure the prompt delivery of compensation under this Act;

(b) gather, analyse and disseminate information on workplace injuries and workplace diseases, including epidemiological, occupational and demographic data related to patterns of workplace injuries and workplace diseases; and

(c) monitor developments in the scientific and medical understanding of workplace injuries and workplace diseases with a view to ensuring that the Act is administered in a manner that reflects the latest advances in health sciences and other relevant disciplines.

Premiums for employers

(2) The Commission shall determine the total amount of the premiums to be paid by employers with respect to each year in order to maintain a fund out of which is paid compensation under this Act, the expenses of the Commission, costs of administering this Act and any other payments required to be paid under or in relation to this Act.

Apportionment among classes, etc.

(3) The Commission shall apportion the total amount of the premiums among the classes, subclasses and groups of employers and shall take into account the extent to which each class, subclass or group is responsible for, or benefits from, the costs incurred under this Act.

Premium rates

(4) The Commission shall establish rates to be used to calculate the premiums to be paid by employers in the classes, subclasses or groups for each year.

Same

(5) The Commission may establish different premium rates for a class, subclass or group of employers in relation to the risk of the class, subclass or group. The rates may vary for each individual industry or for individual workplaces.

Method of determining premiums

(6) The Commission shall establish the method to be used by employers to calculate their premiums. The method may be based on the wages earned by an employer's worker.

Bases for calculation

(7) The Commission may establish different payment schedules for different employers for premiums to be paid in a year based on such factors as the Commission considers appropriate.

Obligation of employers

(8) Despite subsections (2) to (7), the Crown in right of Ontario is not required to pay any premiums as an employer to the Commission unless the Legislature has appropriated funds for that purpose.

Policies, etc.

(9) The Commission may establish any policies, guidelines or practices that it considers necessary for the proper functioning of the Commission, provided that the policies, guidelines or practices are consistent with this Act and made available to the public.

Same

(10) If a particular policy, guideline or practice is relevant to a particular decision before the Commission, the Commission shall ensure that the injured worker and their employer are made aware of the policy, guideline or practice.

Standard of decision-making

(11) In making a decision respecting entitlement or the amount of compensation under this Act, the Commission shall give the injured worker or other person seeking compensation under this Act the benefit of reasonable doubt.

Clear record-keeping

(12) The Commission shall ensure that any communication between a decision-maker and any other person that relates to a decision to be made by the Commission is stored in the file of the injured worker to whom the decision relates or, in the case of an oral communication, that an accurate record of the oral communication is made and stored in that file.

Provision of information to the Commission

25. (1) Subject to subsection (3), the Commission may request that any person provide information that it requires for the purposes of fulfilling its functions.

Response to request

(2) A person who receives a request by the Commission shall promptly provide to the Commission any information requested by it that is within the person's custody or under the person's control, unless prevented from doing so by operation of law.

Extent of information

(3) The Commission may not request and shall not collect any personal information unless it is reasonably necessary for the purposes of performing its functions.

Conflict

(4) Where the Commission requests information from a medical practitioner, the medical practitioner's determination as to what personal information is reasonably necessary is binding on the Commission.

Redactions

(5) If a medical practitioner decides to redact information from a record in order to respond to the Commission's request, the medical practitioner shall consult with the patient on the scope of the redactions before disclosing the redacted record to the Commission.

Additional requests

(6) If, after a medical practitioner has responded to a request from the Commission, the Commission requires additional information from the medical practitioner, the Commission is limited to seeking clarification on the basis for a particular diagnosis or prognosis or the basis for the recommended course of treatment.

Clarification re health conditions

(7) If, in responding to a request from the Commission, a medical practitioner includes information about a health condition that is relevant to, but does not arise from, the workplace injury or the workplace disease, the medical practitioner shall explain the relevance of the health condition.

Same

(8) The duty to provide information to the Commission under this section applies despite anything to the contrary in the *Occupational Health and Safety Act*.

Application to Superior Court

26. If any information or document that is required under this Act to be provided to the Commission is not so provided, the Commission may apply to the Superior Court of Justice for such relief as may be required in the circumstances, including an order requiring a person to provide the information or document to the Commission, and the Commission is entitled to the costs of its application.

Reporting to other entities

Report to Minister

27. (1) The Commission may provide any information to the Ministry of Labour, Immigration, Training and Skills Development that, in the opinion of the Commission, should be provided to the Ministry because an investigation may be warranted or because it reflects an anomalous pattern of workplace injuries or workplace diseases or unusually high rates of workplace injuries or workplace diseases in a particular workplace, in workplaces of a particular employer or in a particular industry or type of employment.

Report to police

(2) If the Commission has reason to believe that any person may be engaging in a form of fraud that is punishable under the *Criminal Code* (Canada), the Commission may refer the matter to the appropriate police service, but only after having given any implicated party an opportunity to seek counsel and make representations before the Commission.

Same

(3) If the Commission refers a matter to a police service under subsection (2) or decides not to do so after having given an implicated party an opportunity to seek counsel and make representations, the Commission shall inform the party that the matter has been referred to the police service or that the Commission has decided not to refer the matter to the police service, as the case may be.

Report re threats or retaliation

(4) If the Commission has reasonable grounds to believe that an employer has contravened a provision of the *Criminal Code* (Canada) referred to in subsection (5), the Commission shall promptly refer the matter to the relevant police service.

Same

(5) Subsection (4) applies with respect to the following provisions of the *Criminal Code* (Canada):

1. Section 217.1.

2. Subsection 425.1 (1).

3. A provision that replaced either of the provisions referred to in paragraphs 1 and 2, as they read on the day this subsection came into force.

Personal information

28. The Commission shall not use any personal information collected for the purposes of performing its functions if other information will serve the purpose of the use and shall not disclose any of that information except as necessary to perform its functions or if required to do so by operation of law.

Medical evidence

29. (1) The Commission may require a medical opinion from a medical practitioner with whom the injured worker does not have an existing relationship (referred to in this section as the "second opinion"), subject to the following conditions:

1. The choice of specific medical practitioner to provide the second opinion is that of the injured worker.

2. All costs for obtaining the second opinion shall be paid for by the Commission.

3. The second opinion shall not be given without there having been an in-person examination of the injured worker by the medical practitioner giving the second opinion and any other follow-up examinations or other due diligence that a reasonable medical practitioner would undertake before giving such an opinion and without the medical practitioner having reviewed the initial medical practitioner's complete records.

4. The second opinion shall be restricted to a diagnosis, prognosis or recommended course of treatment or to health conditions that are relevant to the workplace injury or workplace disease.

Communication of opinion

(2) The medical practitioner providing the second opinion shall first provide the opinion to the injured worker and then inform the medical practitioner with whom the injured worker had an existing relationship of the opinion and provide any supporting medical records before finally informing the Commission of the second opinion.

Request by Commission

(3) The Commission may request additional information from the medical practitioner who provided the second opinion but only to clarify the basis for any particular diagnosis or prognosis or the basis for any recommended course of treatment.

Clarification re health conditions

(4) If, in communicating a second opinion to the Commission, the medical practitioner includes information about a health condition that is relevant to, but does not arise from, the workplace injury or the workplace disease, the medical practitioner shall explain the relevance of the health condition.

Payments

30. The Commission shall pay any medical practitioner under this Act at the same rates as provided for under the *Health Insurance Act* and may not request any sort of contribution from the injured worker.

Governance

31. (1) The Commission shall be governed by a board of Commissioners.

Composition of board of Commissioners

(2) In addition to a Chairperson, the board of Commissioners shall consist of,

(a) six representatives of workers;

(b) six representatives of employers; and

(c) a general worker representative, who must be or have been an injured worker, and a general employer representative.

Appointment

(3) The Commissioners shall be appointed by the Lieutenant Governor in Council, with the exception of the Chairperson, who shall be selected in accordance with section 32.

Representative of workers

(4) The representatives of workers shall be drawn from recognized workers organizations, such as unions, federations, congresses, councils of unions, worker advocacy or research or support groups, to represent workers from the industries listed in subsection (7).

Representative of employers

(5) The representatives of employers shall be drawn from the recognized businesses and associations of businesses and trade associations operating or representing businesses that operate in the industries listed in subsection (7).

List

(6) The Commission shall establish a list of recognized workers organizations for the purposes of subsection (4) and recognized businesses, associations of businesses and trade associations for the purposes of subsection (5) and identify the industry listed in subsection (7) with which each is associated.

Industries

(7) The industries mentioned in subsections (4) and (5) are the following:

1. Manufacturing.

2. Construction.

3. Transportation.

4. Health services.

5. General services, including government and public sector services.

6. Mining, forestry, fishing and agriculture.

Candidates with industry support

(8) The Lieutenant Governor in Council shall appoint a candidate to the Commission if the candidate is,

(a) put forward collectively by all recognized workers organizations or by all recognized workers associations associated with a given industry listed in subsection (7); or

(b) put forward collectively by all recognized businesses, associations of businesses and trade associations or by all recognized businesses, associations of businesses and trade associations associated with a given industry listed in subsection (7).

Other candidates

(9) In determining whether to appoint other candidates to the Commission, the Lieutenant Governor in Council shall,

(a) give preference to candidates that,

(i) can demonstrate experience with workers' compensation systems as an injured worker, and

(ii) can demonstrate the greatest degree of support from or ability to represent their relevant constituency or, in the case of the general worker representative, workers more generally; and

(b) have regard to whether or not a given candidate is an injured worker or has experienced a workplace injury or workplace disease.

Tribunal

(10) The Tribunal may hear any dispute over a candidate's degree of support from or ability to represent a given constituency.

Recommendations to Minister

(11) After deciding a dispute under subsection (10), the Tribunal shall advise the Lieutenant Governor in Council of its recommendations and the reasons for the recommendations and within seven days after doing so shall publish the recommendations and reasons on its website.

Chairperson

32. (1) The Chairperson of the board of Commissioners shall conduct and participate in all meetings of the board but may not vote, except in the event of a tie vote, in which case the Chairperson shall have the deciding vote.

Selection

(2) The Chairperson shall be selected unanimously by all of the Commissioners. If however the Commissioners cannot agree on a candidate, each Commissioner may put forward a candidate to the Chief Justice of Ontario, who shall select a candidate to be the Chairperson.

Terms of Commissioners

33. (1) Commissioners shall serve terms of 3 years and may be reappointed.

Non-revocable

(2) An appointment, once made, may not be revoked.

Initial Commissioners

(3) In any given year, the terms of one third of the Commissioners shall expire and, for this purpose, the Lieutenant Governor in Council may appoint the initial Commissioners for terms of less than three years, despite subsection (1).

Vacancies

(4) Any vacancy on the board of Commissioners shall be filled promptly in the same manner as the Commissioner whose absence created the vacancy, and the replacement Commissioner shall serve the balance of the term of their predecessor.

Chief executive officer

34. The board of Commissioners shall hire a chief executive officer responsible for the day-to-day operations of the Commission, on such terms and conditions as the board considers appropriate, and the chief executive officer shall be responsible to the board of Commissioners.

Obligations of board and CEO

35. The Commissioners and chief executive officer shall perform their duties in a manner consistent with the purposes of this Act and the principles it articulates.

Meetings

Quorum

36. (1) At a meeting of the board, quorum is constituted if,

(a) a majority of the Commissioners are present; and

(b) the number of worker representatives and employer representatives are equal.

Meetings

(2) The board of Commissioners shall meet at the times and in the manner that the board considers appropriate but must do so at least 10 times in a given calendar year.

Rules of procedure

(3) The board of Commissioners shall establish procedural rules governing its meetings and shall follow Robert's Rules of Order for any matter not covered by its procedural rules.

Records of meetings

(4) The board of Commissioners shall ensure that accurate minutes of each of its meetings are prepared and posted on the website of the Commission.

Exceptions

(5) The board of Commissioners may remove from the minutes before posting them on the Commission's website,

(a) any information of a personal nature;

(b) information respecting ongoing contract negotiations;

(c) information that is subject to solicitor-client privilege; and

(d) any other information that the Commission is not legally authorized to publicly disclose.

Re-posting

(6) The board of Commissioners shall ensure that any minutes are reposted on the website of the Commission if,

(a) information had been removed from the minutes under subsection (5); and

(b) the reasons for which the information was removed from the minutes are no longer applicable.

Offices of the Worker and Employer Advisers

Office continued

37. (1) The Office of the Worker Adviser is continued. Its functions are to,

(a) provide advice in respect of this Act to injured workers and their survivors and represent them in their dealings with the Commission;

(b) educate workers and the public at large about injured workers, the system of compensation for injured workers and workplace accidents and workplace diseases; and

(c) issue public recommendations to the Commission on trends and patterns among injured workers and problems they face.

Same

(2) The Office of the Employer Adviser is continued. Its functions are to,

(a) provide advice in respect of this Act to employers with fewer than 20 employees and represent them in their dealings with the Commission;

(b) educate employers and the public at large about injured workers, the system of compensation for injured workers and workplace accidents and workplace diseases; and

(c) issue public recommendations to the Commission on trends and patters among small employers and problems they face.

Costs

(3) The Commission shall pay the costs that may be incurred by each office in performing its functions and ensure that funding for the office is sufficient to meet the following service standards:

1. For the Office of the Worker Adviser, no injured worker should wait more than 15 days for a meeting with a qualified lawyer or paralegal upon requesting such a meeting.

2. For the Office of the Employer Adviser, no employer should wait more than 15 days for a meeting with a qualified lawyer or paralegal upon requesting such a meeting.

PART VI
TRIBUNAL

Tribunal

38. The Workplace Safety and Insurance Appeals Tribunal is continued under the name Workers' Compensation Appeals Tribunal of Ontario in English and Tribunal d'appel en matière d'indemnisation des travailleurs de l'Ontario in French.

Composition of Tribunal

39. (1) The Tribunal shall be headed by a Chief Adjudicator appointed by the Lieutenant Governor in Council.

Qualifications of Chief Adjudicator

(2) In order to be appointed as the Chief Adjudicator, an individual must have at least 10 years experience as,

(a) a judge of the Superior Court of Justice with managerial responsibilities;

(b) a labour relations arbitrator;

(c) a decision-maker in an administrative law context with managerial responsibilities; or

(d) some combination of the positions set out in clauses (a) to (c).

Nominees for position of Chief Adjudicator

(3) The Lieutenant Governor in Council shall appoint the Chief Adjudicator.

Nominees for position of Adjudicator

(4) The Chief Adjudicator shall appoint individuals as Adjudicators.

Age limit

(5) The Chief Adjudicator and the Adjudicators shall not serve past the age of 65.

Exception

(6) Despite subsection (5), the Chief Adjudicator or an Adjudicator may serve until the age of 70 with,

(a) in the case of the Chief Adjudicator, the approval of the Lieutenant Governor in Council and the support of the majority of Adjudicators; and

(b) in the case of an Adjudicator, the approval of the Chief Adjudicator.

External activities prohibited

(7) The Chief Adjudicator and other Adjudicators shall not engage in any other employment or perform any other remunerated activities.

Allegation against Adjudicator

(8) In the event of a credible allegation that an Adjudicator is unable or unwilling to execute the duties of an Adjudicator in a competent, timely or unbiased manner, the Chief Adjudicator shall strike a panel of Adjudicators to investigate the allegation, which shall prepare a report on the allegation and make recommendations on next steps to the Chief Adjudicator.

Decision of Chief Adjudicator

(9) The Chief Adjudicator shall review the report and determine what action is necessary to respond to the allegations, which may include,

(a) declaring that the allegations do not warrant any further action;

(b) requiring the Adjudicator to undertake remedial education on any relevant topic;

(c) providing reasonable accommodation for an Adjudicator's disability; or

(d) disciplining the Adjudicator, including suspending the Adjudicator or terminating the Adjudicator's appointment.

Allegation against Chief Adjudicator

(10) In the event of a credible allegation that the Chief Adjudicator is unable or unwilling to execute the duties of the Chief Adjudicator in a competent, timely or unbiased manner, the Lieutenant Governor in Council shall strike a panel of Superior Court Judges, based on the recommendations of the Chief Justice of Ontario, who shall investigate the allegation, prepare a report on the allegation and make recommendations on next steps to the Lieutenant Governor in Council.

Decision of Lieutenant Governor in Council

(11) The Lieutenant Governor in Council shall review the report and determine what action is necessary to respond to the allegations, which may include,

(a) declaring that the allegations do not warrant any further action;

(b) requiring the Chief Adjudicator to undertake remedial education on any relevant topic;

(c) providing reasonable accommodation for the Chief Adjudicator's disability; or

(d) disciplining the Chief Adjudicator, including suspending the Chief Adjudicator or terminating the Chief Adjudicator's appointment.

Compensation

(12) For administrative purposes, the Chief Adjudicator,

(a) shall be considered a Deputy Minister and is entitled to the same compensation as a Deputy Minister; and

(b) shall report directly to the Attorney General.

Duties of Chief Adjudicator

40. The Chief Adjudicator shall,

(a) determine the times and places at which and the manner in which all appeals are conducted; and

(b) establish practices and procedures for appeals and ensure that they are published on a website of the Tribunal.

Funding

41. (1) The Chief Adjudicator shall prepare an annual budget for the operation of the Tribunal and present it to the Attorney General. The Attorney General shall forward the budget to the Commission, which shall provide the necessary funds.

Auditor General

(2) The accounts of the Tribunal shall be audited by the Auditor General annually.

PART VII
MISCELLANEOUS

No cause of action

42. No action or other civil proceeding for negligence may be commenced by an injured worker or by a surviving family member of an injured worker against the injured worker's employer in connection with the workplace injury or workplace disease.

Provision of information

43. Every injured worker and every employer shall promptly report to the Commission any workplace accident or the onset of a workplace disease or any information that leads them to suspect that a workplace accident has occurred or that an individual has acquired a workplace disease.

Employers to report employment

44. If an employer enters into an employer-employee relationship with a worker, the employer shall register that fact with the Commission within 15 days after entering into the relationship if, in accordance with the worker's conditions of employment, the worker is to receive compensation in the form of a salary or other benefits that would result in the worker receiving or expecting to receive,

(a) compensation in an amount equivalent to at least 100 dollars in any 30-day period;

(b) compensation in an amount equivalent to at least 600 dollars in any six-month period; or

(c) compensation in an amount equivalent to at least 1,200 dollars in any 12-month period.

Regulations for reporting system

45. (1) The Commission shall, by regulation, establish a system for the reporting, by workers and employers, of accidents, injuries or diseases occurring in the workplace or other circumstances that may suggest an unsafe workplace.

Scope

(2) Without limiting the generality of subsection (1), the system shall provide for the reporting of,

(a) accidents requiring the delivery of first aid;

(b) accidents necessitating subsequent medical interventions of any nature; and

(c) accommodations or other changes to a worker's duties for reasons related to the worker's health, even if the health issue does not stem from the worker's occupation.

PART VIII
TRANSITION

Definition

46. In this Part,

"predecessor Act" means the *Workplace Safety and Insurance Act, 1997*.

Transition to this Act

47. (1) Injured workers who are receiving benefits under the predecessor Act on the day this Act comes into force shall have their cases reviewed and a decision made as to entitlement to compensation under this Act, except that, if it is determined that an injured worker is entitled to a greater amount of compensation under the predecessor Act, the injured worker shall remain

entitled to that amount of compensation, despite the provisions of this Act and the repeal of the predecessor Act.

Same

(2) Until an injured worker's case is reviewed under subsection (1), the injured worker shall remain entitled to compensation under the predecessor Act and, despite the repeal of the predecessor Act, its provisions continue to apply to the extent necessary.

Schedule

(3) The reviews under subsection (1) shall begin no later than the first anniversary of the day on which this Act comes into force and, between each subsequent anniversary, at least 20 per cent of the overall number of required reviews must be completed, with all reviews completed no later than the sixth anniversary of the day on which this Act comes into force.

Oldest cases first

(4) Cases for review shall be prioritized based on their age, with the oldest cases given the most priority.

Continued application of WSIA

(5) Sections 15 and 15.1 of the predecessor Act, along with Schedules 3 and 4 to that Act, continue to apply, with necessary modifications, for the purposes of this Act until the regulations under subsection (6) are made.

Regulations

(6) The Lieutenant Governor in Council shall, by regulation, restate the content of sections 15 and 15.1 of the predecessor Act, along with Schedules 3 and 4 to that Act, for the purposes of this Act.

References to the *Workplace Safety and Insurance Act, 1997*

48. (1) Subject to subsection (2), in any Act or regulation, other than this Act or a regulation made under this Act, references to,

(a) the predecessor Act are deemed to be references to this Act;

(b) the Workplace Safety and Insurance Board are deemed to be references to the Commission; and

(c) the Workplace Safety and Insurance Appeals Tribunal are deemed to be references to the Tribunal.

Same

(2) If applying the rule in subsection (1) to a provision in an Act or a regulation would lead to a result that is not reasonably intended, the provision shall be interpreted so as to best facilitate the transition between the predecessor Act and this Act.

Regulations

49. (1) The Lieutenant Governor in Council may make regulations as the Lieutenant Governor in Council considers necessary for the implementation and administration of this Act, including anything in this Act referred to as being done by regulation.

Notice

(2) If the Lieutenant Governor in Council makes a regulation under subsection (1), the Lieutenant Governor in Council shall publish an explanation of how the regulation promotes the principles of this Act.

PART IX
REPEAL, COMMENCEMENT AND SHORT TITLE

Workplace Safety and Insurance Act, 1997

50. The *Workplace Safety and Insurance Act, 1997* is repealed.

Commencement

51. This Act comes into force on the first anniversary of the day on which this Act receives Royal Assent.

Short title

52. The short title of this Act is the *Meredith Act (Fair Compensation for Injured Workers), 2025*.

Loi Meredith de 2025 sur l’indemnisation équitable des travailleurs blessés

NOTE EXPLICATIVE

Le projet de loi abroge la *Loi de 1997 sur la sécurité professionnelle et l’assurance contre les accidents du travail* et édicte la *Loi Meredith de 2025 sur l’indemnisation équitable des travailleurs blessés*, qui établit un régime d’indemnisation des travailleurs ayant connu un accident du travail ou développé une maladie professionnelle. La Loi envisage également la fourniture de services pour aider les travailleurs blessés dans leur parcours de réadaptation et de recyclage. La Commission de l’indemnisation des travailleurs de l’Ontario est chargée de l’application de la Loi. Un tribunal, connu sous le nom de Tribunal d’appel en matière d’indemnisation des travailleurs de l’Ontario, est établi pour entendre les différends qui découlent de l’application de la Loi. Enfin, des dispositions concernant la transition entre les deux lois sont prévues.

Projet de loi **2025**

Loi édictant la Loi Meredith de 2025 sur l'indemnisation équitable des travailleurs blessés et abrogeant la Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail

SOMMAIRE

Sa Majesté, sur l'avis et avec le consentement de l'Assemblée législative de la province de l'Ontario, édicte :

PARTIE I
INTERPRÉTATION, OBJETS ET PRINCIPES

Interprétation

1. (1) Les définitions qui suivent s'appliquent à la présente loi.

«accident du travail» Incident qui se produit lorsqu'un travailleur effectue, pour un employeur, un travail et qui lui cause un préjudice de nature non insignifiante. («workplace accident»)

«Commission» La Commission de l'indemnisation des travailleurs de l'Ontario prorogée en application de l'article 23. («Commission»)

«lésion professionnelle» Lésion subie dans le cadre d'un accident du travail. («workplace injury»)

«maladie professionnelle» S'entend au sens que lui donne le paragraphe (3). («workplace disease»)

«personne à charge» S'entend au sens de la partie III de la *Loi sur le droit de la famille*. («dependant»)

«règlements» Les règlements pris en vertu de la présente loi. («regulations»)

«travailleur» Personne effectuant un travail pour un employeur ou lui fournissant des services dans le cadre d'une relation employeur-employé. («worker»)

«travailleur blessé» Travailleur blessé à la suite d'un accident du travail ou ayant une maladie professionnelle. («injured worker»)

«Tribunal» Le Tribunal d'appel en matière d'indemnisation des travailleurs de l'Ontario prorogé en application de l'article 38. («Tribunal»)

Relation employeur-employé

(2) Pour l'application de la présente loi :

a) une relation employeur-employé existe entre un travailleur et un employeur si les deux parties ont conclu un contrat de travail, qu'il soit écrit, verbal ou implicite;

b) le particulier qui effectue un travail pour un employeur en tant qu'alternant, apprenti, stagiaire ou bénévole est réputé avoir une relation employeur-employé avec l'employeur.

Maladie professionnelle

(3) Pour l'application de la présente loi, une maladie touchant un travailleur est une maladie professionnelle s'il est raisonnable, dans les circonstances, de conclure que les conditions de travail du travailleur ont contribué de manière significative au développement de la maladie chez le travailleur en fonction de ce qui suit :

a) des données scientifiques et preuves statistiques pertinentes;

b) des renseignements sur les éléments auxquels le travailleur aurait pu être exposé dans le cadre d'un travail effectué pour son employeur;

c) la présomption que les expositions sont cumulatives, sauf preuve du contraire.

Travailleur blessé de manière permanente

(4) Pour l'application de la présente loi, un travailleur blessé est un travailleur blessé de manière permanente s'il est raisonnable, dans les circonstances, de conclure que le travailleur sera incapable de reprendre le travail qu'il effectuait avant sa lésion professionnelle ou l'apparition de la maladie professionnelle en raison des effets de cette lésion ou de cette maladie.

Caisse

(5) La Commission maintient une caisse dans laquelle sont versées les primes qu'acquittent les employeurs. La totalité des indemnités versées en vertu de la présente loi, des dépenses de la Commission, des frais d'application de la présente loi et des autres versements exigés par la présente loi ou relativement à la présente loi est prélevée sur cette caisse.

Objet

2. (1) Compte tenu du compromis historique dans le cadre duquel les travailleurs ont renoncé à leur droit d'intenter une action civile devant les tribunaux en échange d'une indemnisation en temps opportun sans égard à la faute pour les pertes résultant d'accidents du travail et de maladies professionnelles, l'objet principal de la présente loi est de fournir une indemnisation et des prestations aux travailleurs blessés et aux membres de famille survivants des travailleurs décédés et d'assurer la réadaptation et la formation des travailleurs blessés et des membres de leur famille.

Autre objet

(2) La présente loi a également pour objet de permettre, d'une part, la collecte et l'analyse de renseignements sur la santé et la sécurité au travail, les lésions professionnelles et les maladies professionnelles et, d'autre part, la diffusion de ces renseignements, notamment auprès du gouvernement de l'Ontario, des organismes gouvernementaux, d'autres gouvernements, des médecins-hygiénistes, des coroners et du public.

Principes

3. Les principes suivants doivent être respectés dans le cadre de l'interprétation et de l'application de la présente loi :

1. L'indemnisation doit être proportionnelle au degré de pertes de gains et de pertes immatérielles.

2. L'indemnisation doit être versée rapidement aux travailleurs blessés sans la nécessité d'une action civile.

3. L'objet de l'indemnisation est, au minimum, de placer les travailleurs blessés dans un poste aussi proche que possible de celui qui serait le leur, n'était la lésion professionnelle ou la maladie professionnelle afin de leur éviter d'être un fardeau pour leur famille, leurs amis ou la collectivité en général.

4. Les fonds et actifs de la Commission doivent être considérés comme une fiducie d'intérêt public au profit des travailleurs blessés actuels et futurs pour l'application de la common law et d'autres lois.

5. Les travailleurs blessés doivent bénéficier d'une garantie de paiement.

6. L'indemnisation doit être payée aux travailleurs blessés, sans égard à la faute ou à la négligence de qui que ce soit et sans égard à une affection ou faiblesse préexistantes ou à une susceptibilité préexistante à des préjudices, connues ou non.

7. L'administration du programme d'indemnisation et le système d'appel des décisions en matière d'indemnisation doivent être indépendants et libres de toute ingérence du pouvoir exécutif, d'une manière similaire à l'indépendance et à l'absence d'ingérence du pouvoir exécutif dont jouit l'appareil judiciaire.

8. L'administration du programme d'indemnisation et le règlement de tout différend qui en découle relèvent de la compétence exclusive de la Commission et du Tribunal, respectivement, qui sont deux organes indépendants.

PARTIE II
INDEMNISATION ET SÉCURITÉ D'EMPLOI

Définition

4. La définition qui suit s'applique à la présente partie.

«travailleur décédé» Travailleur dont la mort résulte d'un accident du travail ou d'une maladie professionnelle.

Droit à indemnisation

5. (1) La Commission verse au travailleur blessé l'indemnisation à laquelle il a droit en vertu de la présente partie, selon les montants fixés en application de la présente partie.

Idem

(2) L'indemnisation est versée promptement au travailleur blessé.

Idem

(3) Il est entendu que le droit d'un travailleur blessé à un type donné d'indemnisation n'a aucune incidence sur son droit à d'autres types d'indemnisation.

Avis : droit à indemnisation

6. (1) L'employeur avise la Commission, dès qu'il est raisonnablement possible de le faire dans les circonstances, de tout accident du travail ou de toute apparition d'une maladie professionnelle dont il a connaissance.

Idem

(2) Après avoir été avisée d'un accident du travail ou de l'apparition d'une maladie professionnelle, la Commission envoie promptement une copie de l'avis aux personnes suivantes :

a) le travailleur blessé concerné, si elle a été avisée par l'employeur;

b) l'employeur concerné, si elle a été avisée par le travailleur blessé;

c) le comité sur la santé et la sécurité au travail ou le délégué à la santé et à la sécurité, s'il y en a un.

Renseignements confidentiels

(3) L'employeur, le travailleur blessé, le comité sur la santé et la sécurité au travail ou le délégué à la santé et à la sécurité ne doivent pas divulguer les renseignements figurant dans un avis, sauf si ces renseignements peuvent indiquer la commission d'une infraction au *Code criminel* (Canada) ou une violation de la *Loi sur la santé et la sécurité au travail*.

Violation de la *Loi sur la santé et la sécurité au travail*

(4) La Commission communique au ministère du Travail, de l'Immigration, de la Formation et du Développement des compétences les renseignements figurant dans un avis et pouvant indiquer une violation de la *Loi sur la santé et la sécurité au travail*.

Infraction

(5) Si les renseignements figurant dans un avis peuvent indiquer une infraction au *Code criminel* (Canada), la Commission établit promptement s'il y a des motifs raisonnables de croire qu'une infraction a été commise; le cas échéant, elle communique promptement ces renseignements au service de police compétent.

Interdiction d'exercer des représailles

(6) Il est interdit de prendre des mesures pouvant porter préjudice à un particulier parce que celui-ci a communiqué des renseignements sur un éventuel droit à indemnisation d'une personne en vertu de la présente loi.

Avis à la police

(7) Si elle a connaissance d'une personne ayant pris une mesure visée au paragraphe (6), la Commission renvoie la question au service de police compétent.

Divulgation par le comité ou le délégué

(8) Malgré toute disposition contraire de la *Loi sur la santé et la sécurité au travail*, le comité sur la santé et la sécurité au travail ou le délégué à la santé et à la sécurité peut divulguer des renseignements à la Commission sur un éventuel accident du travail ou une

éventuelle maladie professionnelle qui pourrait donner des droits en application de la présente loi.

Perte de gains

7. (1) Le travailleur blessé a droit, pendant une période donnée, à une indemnisation sous forme de paiements correspondant à sa perte de gains en raison de la lésion professionnelle ou de la maladie professionnelle.

Montant de la perte de gains

(2) Les paiements correspondant à la perte de gains pendant une période donnée doivent équivaloir à 90 % de la somme calculée après :

a) l'établissement du revenu réputé du travailleur pour la période;

b) la déduction du revenu réputé du travailleur de tout gain tiré d'un travail pendant la période;

c) la déduction du montant calculé en application de l'alinéa b) de tout impôt qui serait à payer si l'indemnisation était considérée comme un revenu tiré d'un travail.

Revenu réputé

(3) Le revenu réputé du travailleur pendant une période donnée est calculé en fonction d'un revenu annuel supposé égal au plus élevé de ce qui suit :

1. Le montant total des gains d'emploi déclarés dans la déclaration de revenus du travailleur à l'égard de l'année précédant la période en question.

2. Le montant moyen des gains d'emploi déclarés dans les déclarations de revenus du travailleur à l'égard des cinq années précédant la période en question.

Déclarations de revenus non produites

(4) Si le travailleur n'a pas produit de déclaration de revenus à l'égard de l'année précédente, la Commission prend les mesures suivantes :

a) elle verse des prestations provisoires au taux qu'elle a calculé;

b) elle offre promptement d'aider le travailleur blessé à produire ses déclarations de revenus;

c) elle oriente promptement le travailleur vers une liste de personnes qualifiées pouvant l'aider à préparer ses déclarations de revenus.

Liste

(5) La Commission tient une liste pour l'application de l'alinéa (4) c).

Modification de la déclaration de revenus

(6) En cas de modification de la déclaration de revenus, le revenu réputé du travailleur est recalculé; le montant des paiements au titre des gains perdus est recalculé en conséquence.

Indexation

(7) Si le travailleur est blessé de manière permanente à la suite d'un accident du travail ou de l'apparition d'une maladie professionnelle entraînant une perte de gains, le paiement correspondant aux gains perdus est indexé, le 1er janvier de chaque année, sur l'indice des prix à la consommation de Statistique Canada; cette indexation ne doit pas donner lieu à une réduction du montant des paiements.

Règlements

(8) Les règlements peuvent préciser des questions relatives au protocole d'indexation des paiements correspondant à la perte de gains prévu au paragraphe (7).

Avis à la Commission

(9) Le travailleur blessé et son employeur communiquent à la Commission tout changement concernant les gains du travailleur dans les 30 jours suivant le changement en question.

Paiement en trop

(10) Tout paiement en trop résultant d'un nouveau calcul effectué en application du paragraphe (6) ou d'un changement concernant les gains mentionnés au paragraphe (9) constitue une créance de la Commission que celle-ci peut recouvrer.

Fin des versements

(11) Le versement d'une indemnisation au titre de la perte de gains prend fin à l'un ou l'autre des moments suivants :

a) lorsque les gains du travailleur blessé sont égaux ou supérieurs à son revenu réputé;

b) le jour où le travailleur blessé atteint l'âge de 70 ans, s'il était âgé de 65 ans ou plus à la date de la lésion professionnelle ou de l'apparition de la maladie professionnelle, sous réserve du paragraphe (12);

c) le jour du cinquième anniversaire de la date de la lésion professionnelle ou de l'apparition de la maladie professionnelle, si le travailleur était âgé de 65 ans ou plus à cette date, sous réserve du paragraphe (12);

d) le jour où le travailleur n'est plus déficient à la suite de la lésion professionnelle ou de la maladie professionnelle.

Idem

(12) Dans les circonstances visées aux alinéas (11) b) et c), le versement d'une indemnisation au titre de la perte de gains prend fin à la date ultérieure que fixe la Commission si celle-ci est d'avis, en se fondant sur les preuves à sa disposition, que le travailleur aurait continué de travailler au moins jusqu'à cette date ultérieure.

Indemnisation provisoire

8. (1) Si elle ne peut établir le droit à indemnisation du travailleur sous forme de paiements au titre de la perte de gains dans les 15 jours suivant la réception des renseignements l'avisant du droit à indemnisation éventuel du travailleur, la Commission verse une indemnisation provisoire jusqu'à l'établissement du droit à indemnisation.

Idem

(2) La Commission ne peut recouvrer l'indemnisation provisoire visée au paragraphe (1) qu'en cas de fraude donnant lieu à une déclaration de culpabilité d'une infraction au *Code criminel* (Canada).

Indemnisation en nature

9. (1) Le travailleur blessé a droit à une indemnisation sous forme de paiements au titre des primes d'assurance à son profit et, le cas échéant, au profit de ses personnes à charge, qui sont nécessaires au maintien d'une couverture d'assurance-santé au moins identique à celle dont lui et ses personnes à charge bénéficiaient au moment de l'accident du travail ou de l'apparition de la maladie professionnelle.

Fin du versement des primes d'assurance

(2) Le versement des primes d'assurance au profit du travailleur blessé et, le cas échéant, de ses personnes à charge prend fin :

a) soit lorsque le travailleur blessé reprend le travail;

b) soit lorsque le travailleur blessé aurait cessé d'être membre du régime d'assurance en raison de son départ à la retraite;

c) soit lorsque la relation employeur-employé du travailleur blessé prend fin conformément à la présente loi.

Prestations non imposables

(3) Si le travailleur blessé recevait des prestations non imposables dans le cadre de la rémunération que lui versait son employeur, l'employeur continue de lui verser ces prestations pendant la durée d'emploi du travailleur blessé jusqu'à son retour au travail.

Cotisations au régime de retraite

10. (1) Le travailleur blessé a droit à une indemnisation sous forme de cotisations, payées pour son compte, à tout régime de retraite d'employeur dont il est membre.

Fin du versement des cotisations

(2) Le versement des cotisations à un régime de retraite pour le compte du travailleur blessé prend fin :

a) soit lorsque le travailleur blessé cesse de recevoir une indemnisation correspondant à sa perte de gains;

b) soit le jour où le travailleur blessé atteint l'âge de 70 ans, s'il était âgé de 65 ans ou plus à la date de l'accident du travail ou de l'apparition de la maladie professionnelle, sous réserve du paragraphe (3);

c) soit le jour du cinquième anniversaire de la date de l'accident du travail ou de l'apparition de la maladie professionnelle, si le travailleur était âgé de 65 ans ou plus à cette date, sous réserve du paragraphe (3).

Idem

(3) Dans les circonstances visées aux alinéas (2) b) et c), le versement des cotisations à un régime de retraite pour le compte du travailleur blessé prend fin à la date ultérieure que fixe la Commission si celle-ci est d'avis, en se fondant sur les preuves à sa disposition, que le travailleur aurait continué à travailler au moins jusqu'à cette date.

Cotisations au RPC

11. (1) Sous réserve du *Régime de pensions du Canada* ou d'une autre loi fédérale, le travailleur blessé a droit à une indemnisation sous forme de cotisations au Régime de pensions du Canada payées pour son compte.

Fin des cotisations

(2) Le versement des cotisations au Régime de pensions du Canada pour le compte du travailleur blessé prend fin :

a) soit lorsque le travailleur blessé cesse de recevoir une indemnisation correspondant à sa perte de gains;

b) soit lorsque le travailleur blessé commence à recevoir des paiements du Régime de pensions du Canada.

Régime de retraite de la Commission

12. (1) La Commission établit un régime de retraite dont peuvent devenir membres les travailleurs blessés de manière permanente n'ayant pas accès à un régime de retraite d'employeur; elle verse à chaque travailleur blessé qui choisit son régime de retraite une indemnisation sous forme de cotisations au régime égales à au moins 17 % de la perte de gains du travailleur blessé.

Versements à partir du régime

(2) Les versements aux membres du régime de retraite sont effectués mensuellement; ils commencent lorsque le membre cesse de recevoir une indemnisation sous forme de paiements pour perte de gains en raison de son âge.

Transfert au régime de retraite de la Commission

(3) Si la relation d'emploi entre le travailleur blessé et son employeur prend fin suite à une déclaration du Tribunal en vertu de la présente loi et que le travailleur blessé était membre d'un régime de retraite de par son emploi, la valeur de rachat de la pension est transférée au régime de retraite de la Commission; la Commission, agissant à la place de l'employeur, continue de contribuer avec le travailleur blessé au régime de retraite comme l'auraient fait l'employeur et le travailleur blessé si la lésion professionnelle ou la maladie professionnelle n'était pas survenue.

Incompatibilité

(4) Le paragraphe (3) l'emporte sur les dispositions incompatibles de la *Loi sur les assurances* ou d'une autre loi.

Perte immatérielle, douleur et souffrances

13. (1) Le travailleur blessé de manière permanente a droit à une indemnisation sous forme de paiements au titre des pertes immatérielles, de la douleur et des souffrances.

Idem

(2) L'indemnisation visée au paragraphe (1) est considérée comme de nature compensatoire, et non comme réparatrice.

Montant de l'indemnisation

(3) La Commission établit le montant de l'indemnisation à laquelle a droit le travailleur blessé; ce montant doit être proportionnel au degré de perte ou de souffrances du travailleur blessé, y compris les pertes matérielles subies, la douleur ressentie, l'ensemble des séquelles physiques et mentales, et tout autre facteur social ou contextuel pertinent.

Fin des versements

(4) L'indemnisation visée au paragraphe (1) ne prend fin que lorsque cessent la douleur, les souffrances ou les pertes associées à la lésion professionnelle ou à la maladie professionnelle.

Prestations aux personnes à charge ou à la succession

14. (1) Si le travailleur décède à la suite d'un accident du travail ou d'une maladie professionnelle, la Commission paie les frais funéraires raisonnables et habituels aux personnes à charge du travailleur décédé ou, à défaut de personnes à charge, à la succession du défunt.

Idem

(2) Les personnes à charge du travailleur décédé, s'il y en a, ont droit à ce qui suit :

a) une indemnisation sous forme de paiements au titre des gains perdus pour la période fixée par les règlements;

b) des cours de formation ou des services de recyclage, comme si les personnes à charge étaient des travailleurs blessés de manière permanente, pour leur permettre de gagner un revenu équivalant à celui du travailleur décédé;

c) un paiement au titre des pertes immatérielles, de la douleur et des souffrances équivalant au revenu annuel réputé du travailleur décédé pour l'application du paragraphe 7 (3).

Bénévoles, etc.

15. Dans le cas d'un travailleur blessé ou d'un travailleur décédé qui est ou n'était pas rémunéré, la Commission lui attribue un montant raisonnable de revenu aux fins du calcul de son droit à indemnisation en vertu de la présente partie ou de celui de ses personnes à charge.

Sécurité d'emploi

16. (1) L'emploi du travailleur blessé ne doit pas être considéré comme interrompu, suspendu ou terminé pour la seule raison que le travailleur a été victime d'une lésion professionnelle ou a contracté une maladie professionnelle; il est entendu que l'employeur du travailleur blessé tient compte de la situation du travailleur blessé dans la limite du préjudice injustifié qu'il pourrait lui-même subir, comme l'exige le *Code des droits de la personne*.

Obligation d'adaptation

(2) Il est entendu qu'un différend entre le travailleur blessé et son employeur quant aux conditions d'emploi du travailleur blessé, de l'adaptation à ses besoins ou de ce qui

constitue un préjudice injustifié dans les circonstances n'a aucune incidence sur les prestations devant être versées par la Commission en vertu de la présente loi.

Médiation

(3) Si le travailleur blessé et son employeur y consentent, la Commission peut renvoyer le différend visé au paragraphe (2) à un médiateur qualifié et indépendant pour médiation.

Décision de la Commission

(4) Si la médiation ne permet pas de régler le différend, la Commission peut le régler et rendre une décision qui lie le travailleur blessé et l'employeur.

PARTIE III
RÉADAPTATION ET FORMATION

Assurance médicale

17. (1) Pour l'application du présent article, sont considérés comme appropriés sur le plan médical les services de diagnostic, les traitements, les médicaments ou les instruments médicaux reconnus comme sûrs et efficaces par les organismes gouvernementaux et ordres professionnels compétents.

Paiement

(2) La Commission paie tout service de diagnostic ou traitement approprié sur le plan médical pour le travailleur blessé si le service ou le traitement n'est pas couvert par le Régime d'assurance-santé de l'Ontario.

Politiques

(3) La Commission élabore des politiques régissant les paiements au titre des services de diagnostic et traitements appropriés sur le plan médical pour les travailleurs blessés non couverts par le Régime d'assurance-santé de l'Ontario et les met à jour au moins tous les trois ans.

Médicaments et instruments médicaux

(4) La Commission couvre le coût des médicaments prescrits ou des instruments médicaux qui sont appropriés sur le plan médical pour un travailleur blessé si ces médicaments ou instruments peuvent aider le travailleur, dans la mesure du possible, à retrouver son état de santé antérieur à la lésion professionnelle ou à l'apparition de la maladie professionnelle.

Assurance privée

(5) Malgré le paragraphe (4), si le coût des médicaments ou des instruments médicaux est couvert par un régime d'assurance-santé dont le travailleur est membre, la Commission n'est tenue de couvrir que les montants non couverts par ce régime.

Formation et recyclage

18. (1) La Commission offre un programme de formation et de recyclage à tout travailleur blessé de manière permanente.

Objet

(2) L'objet du programme de formation et de recyclage est de faire en sorte que le travailleur blessé soit aussi bien positionné sur le marché du travail qu'avant la lésion professionnelle ou l'apparition de la maladie professionnelle.

Élaboration du programme

(3) Lors de l'élaboration d'un programme de formation et de recyclage à l'intention d'un travailleur blessé, la Commission prend en compte la demande sur le marché du travail et les aptitudes, les capacités et les préférences du travailleur.

Demande sur le marché du travail

(4) Lors de son évaluation de la demande sur le marché du travail, la Commission prend en compte les facteurs suivants :

1. Les modèles de travail saisonnier du travailleur blessé.

2. La totalité des marchés du travail à l'échelle locale ou régionale auxquels le travailleur blessé pourrait avoir accès.

3. Tout autre facteur, y compris les facteurs économiques, sociaux ou géographiques, permettant d'établir la meilleure façon de placer le travailleur blessé dans un poste sur le marché du travail aussi bon que celui qu'il occupait avant la lésion professionnelle ou l'apparition de la maladie professionnelle.

PARTIE IV
APPELS

Mandat

19. (1) Le Tribunal a pour mandat d'entendre les différends découlant de l'application, par la Commission, de la présente loi, y compris les différends relatifs à tout retard perçu dans le processus décisionnel de la Commission et les différends relatifs à la compatibilité d'une politique, d'une ligne directrice ou d'une pratique établie par la Commission avec la présente loi.

Droit d'interjeter appel

(2) Le travailleur blessé ou l'employeur peut interjeter appel auprès du Tribunal de toute décision de la Commission le concernant.

Idem

(3) Dans le cadre d'un appel interjeté en vertu du paragraphe (2), le travailleur blessé ou l'employeur peut contester la validité des politiques, des lignes directrices ou des pratiques que la Commission a établies et mises en application afin de prendre la décision faisant l'objet de l'appel sur la base de leur incompatibilité avec la présente loi.

Tribunal des droits de la personne de l'Ontario

(4) Le travailleur blessé peut choisir d'interjeter appel d'une décision de la Commission visée au paragraphe 16 (4) auprès du Tribunal des droits de la personne de l'Ontario si le différend concerne uniquement l'obligation d'adaptation prévue au *Code des droits de la personne*.

Pouvoirs du Tribunal

(5) Après avoir donné au travailleur blessé et à l'employeur l'occasion de se faire entendre, le Tribunal peut prendre l'une ou l'autre des mesures suivantes :

1. Ordonner à la Commission de faire quoi que ce soit que la Commission est autorisée à faire en vertu de la présente loi, y compris verser une indemnisation provisoire en application de l'article 8.

2. Ordonner la nullité d'une politique, d'une ligne directrice ou d'une pratique de la Commission et, en conséquence, sa non-application par la Commission.

Idem

(6) Si le différend concerne une question relevant de la compétence du lieutenant-gouverneur en conseil, la Commission ne peut que faire des recommandations au lieutenant-gouverneur en conseil.

Processus d'appel

20. (1) En cas d'appel devant le Tribunal, la Commission envoie promptement au travailleur blessé concerné par l'appel ou à son représentant ce qui suit :

1. Toute communication entre un décideur et toute autre personne qui a trait à la décision faisant l'objet de l'appel.

2. La copie de tout document utilisé par le décideur pour arriver à la décision et pour préparer les motifs de la décision, y compris toute politique, ligne directrice ou pratique qu'il a utilisée.

3. Tout autre document ou renseignement dont la Commission a la possession et qui se rapporte à la décision faisant l'objet de l'appel.

Non-communication de renseignements

(2) La non-communication des renseignements visés au paragraphe (1) donne lieu à une conclusion défavorable qui s'interprète au profit du travailleur blessé.

Appels : obligation d'adaptation

21. (1) Dans le cadre d'un appel concernant l'obligation d'adaptation à l'égard d'un travailleur blessé prévue par le *Code des droits de la personne*, le Tribunal accepte l'avis d'un médecin dûment qualifié, y compris toute recommandation sur des adaptations du lieu de travail, comme établissant définitivement les faits médicaux en cause.

Préjudice injustifié

(2) S'il décide qu'il ne peut être tenu compte de la situation du travailleur blessé sans que l'employeur subisse un préjudice injustifié, le Tribunal peut déclarer que la relation d'emploi a pris fin sans motif valable, auquel cas le travailleur blessé doit recevoir les indemnisations exigées par l'accord ou les accords régissant l'emploi, la common law ou toute loi applicable.

Interprétation

(3) La présente loi ne doit pas être interprétée de manière soit à empêcher un travailleur blessé d'exercer un recours devant une autre instance pour un congédiement supposé irrégulier, soit à limiter les recours dont dispose le travailleur blessé dans de telles circonstances.

PARTIE V
COMMISSION ET BUREAUX CONSULTATIFS

Définition

22. La définition qui suit s'applique à la présente partie.

«renseignements personnels» S'entend au sens de la *Loi sur l'accès à l'information et la protection de la vie privée*.

Commission

23. (1) La personne morale appelée Commission de la sécurité professionnelle et de l'assurance contre les accidents du travail est prorogée sous le nom de Commission de l'indemnisation des travailleurs de l'Ontario en français et de Worker's Compensation Commission of Ontario en anglais.

Pouvoirs

(2) La Commission a la capacité ainsi que les droits et les pouvoirs d'une personne physique pour exercer ses fonctions; elle peut retenir les services de dirigeants et d'employés et obtenir l'aide qu'elle estime nécessaires.

Vérificateur général

(3) Les comptes de la Commission sont vérifiés par le vérificateur général chaque année.

Fonctions de la Commission, notamment en matière de fixation des primes pour les employeurs

24. (1) Les fonctions de la Commission sont les suivantes :

a) appliquer la présente loi et veiller au prompt versement des indemnisations prévues par la présente loi;

b) recueillir, analyser et diffuser des renseignements sur les lésions professionnelles et les maladies professionnelles, y compris des données épidémiologiques, professionnelles et démographiques liées aux tendances en matière de lésions professionnelles et de maladies professionnelles;

c) suivre l'évolution de la compréhension scientifique et médicale des lésions professionnelles et des maladies professionnelles en vue de veiller à ce que la Loi soit appliquée d'une manière qui reflète les dernières avancées dans le domaine des sciences de la santé et dans d'autres disciplines pertinentes.

Employeurs : primes

(2) La Commission fixe le montant total des primes que doivent verser les employeurs à l'égard de chaque année afin de maintenir une caisse sur laquelle sont prélevés les indemnités versées en vertu de la présente loi, les dépenses de la Commission, les frais d'application de la présente loi et les autres versements exigés par la présente loi ou relativement à la présente loi.

Répartition entre les catégories, etc.

(3) La Commission répartit le montant total des primes entre les catégories, sous-catégories et groupes d'employeurs; elle tient compte de la mesure dans laquelle chaque catégorie, sous-catégorie ou groupe est responsable ou bénéficie des frais engagés en application de la présente loi.

Taux des primes

(4) La Commission fixe les taux qui doivent être utilisés pour calculer les primes que doivent verser les employeurs des catégories, sous-catégories ou groupes à l'égard de chaque année.

Idem

(5) La Commission peut fixer des taux de primes différents à l'égard des catégories, sous-catégories ou groupes d'employeurs selon le risque qui existe dans chaque

catégorie, sous-catégorie ou groupe en question; les taux peuvent également varier à l'égard de chaque secteur d'activités professionnelles ou de lieux de travail particuliers.

Méthode de calcul des primes

(6) La Commission établit la méthode de calcul que doivent utiliser les employeurs pour calculer leurs primes; cette méthode peut être fondée sur les salaires des travailleurs de l'employeur.

Fondement des calculs

(7) La Commission peut se fonder sur les facteurs qu'elle estime appropriés pour établir des échéanciers de versements différents selon les employeurs en ce qui concerne les primes qu'ils doivent verser à l'égard d'une année.

Obligation des employeurs

(8) Malgré les paragraphes (2) à (7), la Couronne du chef de l'Ontario n'est tenue de verser des primes en tant qu'employeur à la Commission que si la Législature a affecté des sommes à cette fin.

Politiques, etc.

(9) La Commission peut établir les politiques, les lignes directrices ou les pratiques qu'elle estime nécessaires à son bon fonctionnement, pourvu que ces politiques, lignes directrices ou pratiques soient compatibles avec la présente loi et mises à la disposition du public.

Idem

(10) Si une politique, ligne directrice ou pratique particulière est pertinente en ce qui concerne une décision particulière dont elle est saisie, la Commission veille à ce que le travailleur blessé et son employeur en soient informés.

Norme applicable à la prise de décision

(11) Lorsqu'elle prend une décision en application de la présente loi concernant un droit à indemnisation ou le montant d'une indemnisation, la Commission donne au travailleur blessé ou à toute autre personne demandant une indemnisation le bénéfice du doute raisonnable.

Bonne tenue des dossiers

(12) La Commission veille à ce que toute communication entre un décideur et toute autre personne qui a trait à une décision qu'elle doit prendre soit conservée au dossier du travailleur blessé faisant l'objet de la décision; en cas de communications orales, un enregistrement exact des communications doit être établi et conservé au dossier.

Communication de renseignements à la Commission

25. (1) Sous réserve du paragraphe (3), la Commission peut demander à toute personne de lui communiquer les renseignements dont elle a besoin pour exercer ses fonctions.

Réponse aux demandes

(2) La personne qui reçoit une demande de la Commission lui communique promptement les renseignements demandés qu'elle a en sa possession ou sous son contrôle, sauf si elle en est empêchée par effet de la loi.

Nature des renseignements

(3) La Commission ne peut pas demander, et ne doit pas recueillir, des renseignements personnels, sauf si cela est raisonnablement nécessaire pour l'exercice de ses fonctions.

Incompatibilité

(4) Si la Commission demande des renseignements à un médecin, la décision du médecin quant à savoir quels renseignements sont raisonnablement nécessaires lie la Commission.

Caviardage

(5) S'il décide de caviarder des renseignements d'un dossier afin de donner suite à la demande de la Commission, le médecin doit discuter avec le patient de l'étendue du caviardage avant de divulguer le dossier caviardé à la Commission.

Demandes supplémentaires

(6) Si, après avoir obtenu la réponse du médecin à sa demande, la Commission a besoin de renseignements supplémentaires de la part du médecin, elle se limite à demander des précisions soit sur le fondement d'un diagnostic ou d'un pronostic particulier, soit sur le fondement de tout traitement recommandé.

Précisions : affection

(7) Si, dans sa réponse à la demande de la Commission, le médecin inclut des renseignements sur une affection qui se rapporte à la lésion professionnelle ou à la maladie professionnelle, mais qui n'en résulte pas, il explique la pertinence de cette affection.

Idem

(8) L'obligation de communication de renseignements à la Commission prévue par le présent article s'applique malgré toute disposition contraire de la *Loi sur la santé et la sécurité au travail*.

Requête devant la Cour supérieure de justice

26. Si tout renseignement ou document dont la communication est exigée sous le régime de la présente loi ne lui est pas communiqué, la Commission peut, par voie de requête, demander à la Cour supérieure de justice la mesure de redressement qu'exigent les circonstances, y compris une ordonnance enjoignant à la personne de lui communiquer le renseignement ou le document nécessaire; la Commission a droit aux dépens de la requête.

Rapports aux autres entités

Rapport au ministre

27. (1) La Commission peut communiquer au ministère du Travail, de l'Immigration, de la Formation et du Développement des compétences tout renseignement qui, selon elle, devrait lui être communiqué parce qu'une enquête peut être justifiée ou parce que le renseignement illustre une tendance anormale en matière de lésions professionnelles ou de maladies professionnelles ou un taux inhabituellement élevé de lésions professionnelles ou de maladies professionnelles dans un lieu de travail particulier, dans les lieux de travail d'un employeur particulier ou dans un secteur particulier d'activités professionnelles ou un type particulier d'emploi.

Rapport à la police

(2) Si elle a des raisons de croire qu'une personne peut être en train de commettre une forme de fraude punissable sous le régime du *Code criminel* (Canada), la Commission peut renvoyer la question au service de police compétent, mais seulement après avoir donné à la partie impliquée la possibilité de demander des conseils juridiques et de lui présenter des observations.

Idem

(3) Si elle renvoie une question à un service de police en vertu du paragraphe (2) ou qu'elle décide de ne pas le faire après avoir donné à la partie impliquée la possibilité de demander des conseils juridiques et de présenter des observations, la Commission en informe la partie.

Rapport : menaces ou représailles

(4) Si elle a des motifs raisonnables de croire qu'un employeur a contrevenu à une disposition du *Code criminel* (Canada) visée au paragraphe (5), la Commission renvoie promptement la question au service de police compétent.

Idem

(5) Le paragraphe (4) s'applique à l'égard des dispositions suivantes du *Code criminel* (Canada) :

1. L'article 217.1.

2. Le paragraphe 425.1 (1).

3. Une disposition qui a remplacé une des dispositions visées aux dispositions 1 et 2, telles qu'elles existent le jour de l'entrée en vigueur du présent paragraphe.

Renseignements personnels

28. La Commission ne doit pas utiliser les renseignements personnels recueillis afin d'exercer ses fonctions si d'autres renseignements peuvent servir à cette fin; elle ne doit divulguer aucun de ces renseignements, sauf dans la mesure nécessaire pour exercer ses fonctions ou selon ce qu'exige la loi.

Preuves médicales

29. (1) La Commission peut demander l'avis médical d'un médecin avec lequel le travailleur blessé n'a pas de relation existante (appelé «deuxième avis médical» au présent article), sous réserve des conditions suivantes :

1. Le choix du médecin chargé de fournir le deuxième avis médical appartient au travailleur blessé.

2. Tous les frais liés à l'obtention du deuxième avis médical sont à la charge de la Commission.

3. Le deuxième avis médical ne peut être donné que si le médecin chargé de le donner a examiné personnellement le travailleur blessé, réalisé tout autre examen de suivi ou pris toute autre mesure de diligence raisonnable qu'un médecin raisonnable réaliserait ou prendrait avant de donner un tel avis et examiné l'ensemble du dossier constitué par le médecin initial.

4. Le deuxième avis médical doit être limité soit au diagnostic, au pronostic ou au traitement recommandé, soit à l'affection qui se rapporte à la lésion professionnelle ou à la maladie professionnelle.

Communication de l'avis

(2) Le médecin qui fournit le deuxième avis médical le communique en tout premier lieu au travailleur blessé; il le communique ensuite au médecin ayant une relation existante avec le travailleur blessé et lui fournit les rapports médicaux justificatifs avant de communiquer son avis à la Commission.

Demande par la Commission

(3) La Commission peut demander des renseignements supplémentaires du médecin qui fournit le deuxième avis médical, mais uniquement pour préciser le fondement d'un diagnostic ou d'un pronostic particulier ou le fondement de tout traitement recommandé.

Précisions : affection

(4) Si, dans la communication de son avis à la Commission, le médecin inclut des renseignements sur une affection qui se rapporte à la lésion professionnelle ou à la maladie professionnelle, mais qui n'en résulte pas, il explique la pertinence de cette affection.

Paiements

30. Les honoraires que paie la Commission aux médecins en application de la présente loi sont identiques à ceux que prévoit la *Loi sur l'assurance-santé*; la Commission ne peut exiger aucune participation financière de la part du travailleur blessé.

Gestion

31. (1) La Commission est administrée par un conseil des commissaires.

Composition du conseil des commissaires

(2) En plus du président, le conseil des commissaires se compose des personnes suivantes :

a) six représentants des travailleurs;

b) six représentants des employeurs;

c) un représentant général des travailleurs, qui doit être ou avoir été un travailleur blessé, et un représentant général des employeurs.

Nomination

(3) Les commissaires sont nommés par le lieutenant-gouverneur en conseil, à l'exception du président qui doit être choisi conformément à l'article 32.

Représentants des travailleurs

(4) Les représentants des travailleurs doivent provenir d'organisations reconnues de travailleurs, comme des syndicats, des fédérations, des assemblées, des regroupements de syndicats, des groupes de défense des droits des travailleurs, ou des groupes de recherche ou groupes de soutien des travailleurs chargés de représenter les travailleurs des secteurs d'activités professionnelles énumérés au paragraphe (7).

Représentant des employeurs

(5) Les représentants des employeurs doivent provenir d'entreprises, d'associations d'entreprises et d'associations professionnelles reconnues qui exploitent ou représentent des entreprises intervenant dans les secteurs d'activités professionnelles énumérés au paragraphe (7).

Liste

(6) La Commission dresse la liste des organisations de travailleurs reconnues pour l'application du paragraphe (4) et des entreprises, associations d'entreprises et associations professionnelles reconnues pour l'application du paragraphe (5) et définit le secteur d'activités professionnelles énuméré au paragraphe (7) associé à chacune d'elles.

Secteurs d'activités professionnelles

(7) Les secteurs d'activités professionnelles visés aux paragraphes (4) et (5) sont les suivants :

1. La fabrication.

2. La construction.

3. Le transport.

4. Les services de santé.

5. Les services généraux, y compris les services gouvernementaux et les services du secteur public.

6. Les mines, les forêts, la pêche et l'agriculture.

Candidats avec le soutien d'un secteur d'activités professionnelles

(8) Le lieutenant-gouverneur en conseil nomme un candidat à la Commission si le candidat est :

a) soit proposé collectivement par toutes les organisations de travailleurs reconnues ou toutes les associations de travailleurs reconnues associées à un secteur d'activités professionnelles donné énuméré au paragraphe (7);

b) soit proposé collectivement par toutes les entreprises, associations d'entreprises et associations professionnelles reconnues ou toutes les entreprises, associations d'entreprises et associations professionnelles reconnues associées à un secteur d'activités professionnelles donné énuméré au paragraphe (7).

Autres candidats

(9) Lorsqu'il décide s'il doit ou non nommer d'autres candidats à la Commission, le lieutenant-gouverneur en conseil fait ce qui suit :

a) il accorde la préférence aux candidats qui peuvent, à la fois :

(i) justifier d'une expérience des systèmes d'indemnisation des travailleurs en tant que travailleurs blessés,

(ii) démontrer qu'ils bénéficient du plus grand soutien du groupe auquel ils appartiennent ou qu'ils sont les plus aptes à représenter ce groupe ou, dans le cas du représentant général des travailleurs, des travailleurs en général;

b) il tient compte du fait que les candidats sont ou non des travailleurs blessés ou ont été ou non atteints d'une lésion professionnelle ou d'une maladie professionnelle par le passé.

Tribunal

(10) Le Tribunal peut entendre tout différend concernant soit le niveau de soutien dont bénéficie un candidat du groupe auquel il appartient, soit l'aptitude d'un candidat à représenter ce groupe.

Recommandations au ministre

(11) Après avoir tranché le différend visé au paragraphe (10), le Tribunal communique au lieutenant-gouverneur en conseil ses recommandations motivées; il les affiche sur son site Web dans les sept jours suivants.

Président

32. (1) Le président du conseil des commissaires dirige toutes les réunions du conseil et y prend part; il ne vote qu'en cas d'égalité des voix, auquel cas il a voix prépondérante.

Choix

(2) Le président est choisi à l'unanimité par l'ensemble des commissaires; en cas de désaccord sur le choix d'un candidat, chaque commissaire peut proposer un candidat au juge en chef de l'Ontario, qui choisit alors le président parmi ces candidats.

Mandat des commissaires

33. (1) Les commissaires sont nommés pour un mandat renouvelable de trois ans.

Caractère irrévocable

(2) Une fois faite, une nomination est irrévocable.

Premiers commissaires

(3) Au cours d'une année donnée, le mandat d'un tiers des commissaires arrive à expiration; à cette fin, le lieutenant-gouverneur en conseil peut nommer les premiers commissaires pour un mandat d'une durée inférieure à trois ans, malgré le paragraphe (1).

Postes vacants

(4) Toute vacance au sein du conseil des commissaires est promptement comblée de la même manière que le commissaire dont l'absence a créé la vacance; le commissaire remplaçant exerce ses fonctions pendant le reste du mandat de son prédécesseur.

Directeur général

34. Le conseil des commissaires engage, aux conditions qu'il estime appropriées, un directeur général chargé du fonctionnement au quotidien de la Commission; le directeur général relève du conseil des commissaires.

Obligations du conseil et du directeur général

35. Les commissaires et le directeur général exercent leurs fonctions d'une manière conforme aux objets de la présente loi et aux principes qu'elle énonce.

Réunions

Quorum

36. (1) Lors des réunions du conseil, le quorum est constitué si les conditions suivantes sont réunies :

a) la majorité des commissaires sont présents;

b) les représentants des travailleurs et ceux des employeurs sont en nombre égal.

Réunions

(2) Le conseil des commissaires se réunit aux dates et de la manière qu'il estime appropriées; il doit se réunir au moins 10 fois au cours d'une année civile donnée.

Règles de procédure

(3) Le conseil des commissaires établit les règles de procédure régissant ses réunions; il suit le document intitulé *Robert's Rules of Order* pour toute question non traitée par ces règles.

Procès-verbal des réunions

(4) Le conseil des commissaires veille à ce qu'un procès-verbal exact de chacune de ses réunions soit dressé et affiché sur le site Web de la Commission.

Exceptions

(5) Le conseil des commissaires peut supprimer du procès-verbal, avant de l'afficher sur le site Web de la Commission, les renseignements suivants :

a) tout renseignement de nature personnelle;

b) tout renseignement relatif à des négociations contractuelles en cours;

c) tout renseignement protégé par le secret professionnel de l'avocat;

d) tout autre renseignement que la Commission n'est pas légalement autorisée à divulguer publiquement.

Réaffichage

(6) Le conseil des commissaires veille à ce que tout procès-verbal soit réaffiché sur le site Web de la Commission si, à la fois :

a) des renseignements en ont été supprimés en application du paragraphe (5);

b) les motifs de suppression de ces renseignements ne s'appliquent plus.

Bureaux des conseillers des travailleurs et des conseillers des employeurs
Maintien du bureau

37. (1) Le Bureau des conseillers des travailleurs est prorogé; sa mission est la suivante :

a) fournir des conseils à l'égard de la présente loi aux travailleurs blessés et à leurs survivants, et les représenter dans leurs rapports avec la Commission;

b) éduquer les travailleurs et le grand public sur les travailleurs blessés, le système d'indemnisation des travailleurs blessés, les accidents du travail et les maladies professionnelles;

c) faire des recommandations publiques à la Commission sur les tendances et caractéristiques concernant les travailleurs blessés et les problèmes auxquels ils font face.

Idem

(2) Le Bureau des conseillers des employeurs est prorogé; sa mission est la suivante :

a) fournir des conseils à l'égard de la présente loi aux employeurs comptant moins de 20 employés et les représenter dans leurs rapports avec la Commission;

b) éduquer les employeurs et le grand public sur les travailleurs blessés, le système d'indemnisation des travailleurs blessés, les accidents du travail et les maladies professionnelles;

c) faire des recommandations publiques à la Commission sur les tendances et caractéristiques concernant les petits employeurs et les problèmes auxquels ils font face.

Frais

(3) La Commission assume les frais que peut engager chaque bureau dans l'exercice de ses fonctions et veille à ce que le financement de chaque bureau suffise à respecter les normes de services suivantes :

1. En ce qui concerne le Bureau des conseillers des travailleurs, aucun travailleur blessé ne devrait attendre plus de 15 jours pour rencontrer un avocat qualifié ou un parajuriste qualifié après avoir fait une demande à cet effet.

2. En ce qui concerne le Bureau des conseillers des employeurs, aucun employeur ne devrait attendre plus de 15 jours pour rencontrer un avocat qualifié ou un parajuriste qualifié après avoir fait une demande à cet effet.

PARTIE VI
TRIBUNAL

Tribunal

38. Le Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail est prorogé sous le nom de Tribunal d'appel en matière d'indemnisation des travailleurs de l'Ontario en français et Workers' Compensation Appeals Tribunal of Ontario en anglais.

Composition du Tribunal

39. (1) Le Tribunal est dirigé par un arbitre en chef nommé par le lieutenant-gouverneur en conseil.

Qualités requises de l'arbitre en chef

(2) Afin d'être nommé au poste d'arbitre en chef, un particulier doit avoir au moins 10 ans d'expérience dans un des rôles suivants :

a) juge de la Cour supérieure de justice avec des responsabilités de gestion;

b) arbitre des relations de travail;

c) décideur dans un contexte de droit administratif avec des responsabilités de gestion;

d) une combination des postes énoncés aux alinéas a) à c).

Candidats au poste d'arbitre en chef

(3) Le lieutenant-gouverneur en conseil nomme l'arbitre en chef.

Candidats au poste d'arbitre

(4) L'arbitre en chef nomme les arbitres.

Limite d'âge

(5) Le mandat de l'arbitre en chef et des arbitres expire lorsqu'ils atteignent l'âge de 65 ans.

Exception

(6) Malgré le paragraphe (5), l'arbitre en chef ou un arbitre peut exercer son mandat jusqu'à l'âge de 70 ans avec :

a) dans le cas de l'arbitre en chef, l'approbation du lieutenant-gouverneur en conseil et le soutien de la majorité des arbitres;

b) dans le cas d'un arbitre, l'approbation de l'arbitre en chef.

Activités externes interdites

(7) L'arbitre en chef et les autres arbitres ne doivent ni occuper d'autres postes, ni exercer d'autres activités rémunérées.

Allégation contre un arbitre

(8) En cas d'allégation crédible selon laquelle un arbitre ne peut pas ou ne veut pas exercer ses fonctions d'une manière compétente, opportune ou impartiale, l'arbitre en chef crée un sous-comité d'arbitres chargé d'enquêter sur l'allégation, de préparer un rapport sur l'allégation et de lui faire des recommandations sur les mesures à prendre.

Décision de l'arbitre en chef

(9) L'arbitre en chef examine le rapport et décide des mesures qui sont nécessaires pour répondre à l'allégation; il peut notamment :

a) déclarer que l'allégation ne justifie pas la prise d'autres mesures;

b) exiger que l'arbitre suive une formation de rattrapage sur tout sujet pertinent;

c) fournir des adaptations raisonnables pour tenir compte du handicap de l'arbitre;

d) imposer une peine disciplinaire à l'arbitre, y compris le suspendre, ou mettre fin à ses fonctions.

Allégation contre l'arbitre en chef

(10) En cas d'allégation crédible selon laquelle l'arbitre en chef ne peut pas ou ne veut pas exercer ses fonctions d'une manière compétente, opportune ou impartiale, le lieutenant-gouverneur en conseil crée un sous-comité de juges de la Cour supérieure, sur les recommandations du juge en chef de l'Ontario, chargé d'enquêter sur l'allégation, de préparer un rapport sur l'allégation et de lui faire des recommandations sur les mesures à prendre.

Décision du lieutenant-gouverneur en conseil

(11) Le lieutenant-gouverneur en conseil examine le rapport et décide des mesures qui sont nécessaires pour répondre à l'allégation; il peut notamment :

a) déclarer que l'allégation ne justifie pas la prise d'autres mesures;

b) exiger que l'arbitre en chef suive une formation de rattrapage sur tout sujet pertinent;

c) fournir des adaptations raisonnables pour tenir compte du handicap de l'arbitre en chef;

d) imposer une peine disciplinaire à l'arbitre en chef, notamment le suspendre, ou mettre fin à ses fonctions.

Rémunération

(12) À des fins administratives, l'arbitre en chef :

a) est considéré comme un sous-ministre et a droit à la même rémunération qu'un sous-ministre;

b) rend compte de ses activités directement au procureur général.

Fonctions de l'arbitre en chef

40. L'arbitre en chef exerce les fonctions suivantes :

a) il fixe l'heure et le lieu d'audition des appels ainsi que le processus de déroulement des appels;

b) il établit des pratiques et procédures applicables aux appels et veille à ce qu'elles soient affichées sur un site Web du Tribunal.

Financement

41. (1) L'arbitre en chef prépare un budget annuel en vue d'assurer le fonctionnement du Tribunal et le présente au procureur général, lequel le communique à la Commission pour versement des fonds nécessaires.

Vérificateur général

(2) Le vérificateur général vérifie chaque année les comptes du Tribunal.

PARTIE VII
DISPOSITIONS DIVERSES

Aucune cause d'action

42. Aucune action ou autre instance civile pour négligence ne peut être introduite par le travailleur blessé ou un membre survivant de la famille d'un travailleur blessé contre l'employeur du travailleur blessé relativement à la lésion professionnelle ou à la maladie professionnelle.

Communication de renseignements

43. Chaque travailleur blessé et chaque employeur déclare promptement à la Commission tout accident du travail ou toute apparition d'une maladie professionnelle ou communique tout renseignement qui le conduit à soupçonner l'existence d'un accident du travail ou le développement, par un particulier, d'une maladie professionnelle.

Obligation, pour les employeurs, de déclarer un emploi

44. L'employeur qui noue une relation employeur-employé avec un travailleur doit le déclarer à la Commission dans les 15 jours suivant le début de la relation si, conformément aux conditions d'emploi du travailleur, le travailleur doit recevoir une rémunération sous forme de salaire ou d'autres avantages qui l'amèneraient à recevoir ou à s'attendre à recevoir, selon le cas :

a) une rémunération d'un montant équivalent à au moins 100 dollars par période de 30 jours;

b) une rémunération d'un montant équivalent à au moins 600 dollars par période de six mois;

c) une rémunération d'un montant équivalent à au moins 1 200 dollars par période de 12 mois.

Règlements établissant un système de signalement

45. (1) La Commission, par règlement, établit un système de signalement, par les travailleurs et les employeurs, des accidents, des lésions ou des maladies qui surviennent

au lieu de travail ou dans d'autres circonstances pouvant donner à penser qu'un lieu de travail n'est pas sécuritaire.

Portée

(2) Sans préjudice de la portée générale du paragraphe (1), le système prévoit le signalement des faits suivants :

a) les accidents exigeant la fourniture de premiers soins;

b) les accidents nécessitant des interventions médicales subséquentes de quelque nature que ce soit;

c) les adaptations ou autres modifications aux fonctions d'un travailleur pour des raisons liées à la santé du travailleur, même si le problème de santé ne découle pas de son activité professionnelle.

PARTIE VIII
DISPOSITIONS TRANSITOIRES

Définition

46. La définition qui suit s'applique à la présente partie.

«loi antérieure» S'entend de la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail*.

Transition à la présente loi

47. (1) Les cas de travailleurs blessés qui reçoivent des prestations en vertu de la loi antérieure le jour de l'entrée en vigueur de la présente loi sont réexaminés et une décision est prise quant au droit à indemnisation de ces travailleurs en vertu de la présente loi; toutefois, s'il est établi qu'un travailleur blessé a droit à une indemnisation plus élevée en vertu de la loi antérieure, le travailleur en question conserve son droit à ce montant d'indemnisation malgré les dispositions de la présente loi et l'abrogation de la loi antérieure.

Idem

(2) Jusqu'au réexamen de son cas prévu au paragraphe (1), le travailleur blessé conserve son droit à indemnisation en vertu de la loi antérieure et les dispositions de la loi antérieure continuent de s'appliquer dans la mesure nécessaire malgré l'abrogation de cette loi.

Calendrier

(3) Les examens prévus au paragraphe (1) commencent au plus tard au premier anniversaire du jour de l'entrée en vigueur de la présente loi et, entre chaque anniversaire

subséquent, au moins 20 % du nombre total des réexamens exigés doit être terminé; tous les réexamens doivent avoir pris fin au plus tard au sixième anniversaire du jour de l'entrée en vigueur de la présente loi.

Priorité aux cas anciens

(4) Les cas devant être réexaminés sont classés par ordre de priorité en fonction de leur ancienneté, les cas les plus anciens recevant la plus grande priorité.

Application maintenue : *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail*

(5) Les articles 15 et 15.1 de la loi antérieure, ainsi que les annexes 3 et 4 de cette loi, continuent de s'appliquer, avec les adaptations nécessaires, pour l'application de la présente loi jusqu'à la prise des règlements prévus au paragraphe (6).

Règlements

(6) Le lieutenant-gouverneur en conseil, par règlement, met à jour le contenu des articles 15 et 15.1 de la loi antérieure, ainsi que celui des annexes 3 et 4 de cette loi, pour l'application de la présente loi.

Mentions de la *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail*

48. (1) Sous réserve du paragraphe (2), dans toute loi ou tout règlement, autre que la présente loi ou un règlement pris en vertu de la présente loi, les mentions :

a) de la loi antérieure sont réputées valoir mention de la présente loi;

b) de la Commission de la sécurité professionnelle et de l'assurance contre les accidents du travail sont réputées valoir mention de la Commission;

c) du Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail sont réputées valoir mention du Tribunal.

Idem

(2) Si l'application de la règle prévue au paragraphe (1) à une disposition figurant dans une loi ou un règlement entraînerait un résultat qui n'est pas raisonnablement prévu, la disposition est interprétée de manière à mieux faciliter la transition entre la loi antérieure et la présente loi.

Règlements

49. (1) Le lieutenant-gouverneur en conseil peut prendre les règlements qu'il estime nécessaires en vue de la mise en œuvre et de l'application de la présente loi, notamment tout ce que la présente loi mentionne comme étant fait par règlement.

Avis

(2) Si le lieutenant-gouverneur en conseil prend un règlement en vertu du paragraphe (1), il publie une explication de la manière dont le règlement promeut les principes de la présente loi.

PARTIE IX
ABROGATION, ENTRÉE EN VIGUEUR ET TITRE ABRÉGÉ

Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail

50. La *Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail* est abrogée.

Entrée en vigueur

51. La présente loi entre en vigueur au premier anniversaire du jour où elle reçoit la sanction royale.

Titre abrégé

52. Le titre abrégé de la présente loi est *Loi Meredith de 2025 sur l'indemnisation équitable des travailleurs blessés*.

EXECUTIVE SUMMARY

This Report "*New Directions: Report of the WCB Review 2019"* is the result of a "targeted" Review of the workers' compensation system of British Columbia. The Review was conducted by Janet Patterson under Terms of Reference (TOR) provided by the Minister of Labour, the Honorable Harry Bains.

The Minister had already taken some steps towards ensuring that the Workers' Compensation Board of B.C. or WorkSafeBC (Board) was "worker centred". In 2018, the Minister requested a policy review (the "Petrie Report") and review of the Board's surplus (the "Boygo Report"). This Review was asked to assess how to modernize the Board's culture, case management and return to work (RTW) practices to reflect a worker-centric service delivery model. The Review was also asked to recommend specific steps to improve the confidence of stakeholders, including but not limited to a Fair Practices Office and amendments to the *Workers Compensation Act* ("Act"). The Review was to look at these matters with a GBA+ lens and also ensure that there was outreach to Indigenous communities.

The Review consulted with the public and with stakeholders, as well as with Board management and staff, the Board of Directors and external experts. Public hearings were held throughout the province and over 200 presenters, mostly injured workers and their families, presented their recommendations. In addition, the Review received detailed submissions from all compensation stakeholders as well as almost 2,000 responses to its online questionnaire. One key stakeholder, the Employers' Forum, withdrew from the second stage of consultations. The Report sets out this consultation process in detail.

The recommendations in this Report are drawn from this extensive consultation process.

The Review sets out a context for the Report:

- About 2,000 complaints a year are made about the Board to the Provincial Ombudsperson, MLAs and the Board's Fair Practices Office. The complaints are made mostly, but not exclusively, by injured workers and include unfair Board practices, unfair Board decisions and a lack of respect in its treatment of injured workers. A number of complaints involve complex conditions or long-standing cases.

- Following the United Nations Declaration of the Rights of the Disabled, the biopsychosocial model of disability is now widely accepted. Disabled workers can often work and workplaces must take meaningful steps to accommodate those workers.

- The "best practices" RTW guidelines require a holistic and individualized approach, active participation of the injured individual, the involvement of an expert and collaboration between all of the parties.

- The nature of work has changed and many workers now experience precarious work in the gig economy.

This Review adopted the definition of a "worker-centred" approach used in the Petrie Report. A worker-centred approach is one which allows a consideration of individual

circumstances and also fully seeks to maximize an injured worker's recovery and restore their pre-employment status as much as possible. This definition draws on the principles of the Historic Compromise which is the foundation of the Canadian compensation system.

Assessment of Current Board Culture

Over the last years, the B.C. Board has moved to an "insurance" service delivery model to determine and deliver "entitlements". On the front-line, Board decision-making is largely impersonal and policy driven. The decision-making culture is influenced by the case management system which embeds disability guidelines and timeframes into each claim file. The guidelines are based on diagnosis codes and impose a "one size fits all" framework with recovery and return to work milestones for each diagnosis. Workers with simple traumatic injuries, and those who follow a predicted path of recovery, are generally satisfied with this "cookie cutter" approach.

Board compensation decisions cannot be changed, after 75 days, except on appeal to the Review Division and then to the Workers Compensation Appeal Tribunal (WCAT). Both appeal bodies have limited jurisdiction. In general, the Board's seeks to correct decisions through appeals and may be described as having an appeal-oriented culture.

What We Heard

Through the Review consultation process, we heard that workers whose injuries or recover fell outside the "cookie cutter" guidelines, tended to have very negative compensation experiences and outcomes. This was particularly the experience of workers with serious or complex injuries, concussions, psychological injuries or occupational diseases. Such cases often had poor or no investigations, disregarded medical evidence or little communication with the worker before a decision was made. Workers repeatedly told the Review that they did not feel "heard" through an often adversarial compensation experience. Many reported being spoken to by case managers in hostile or dismissive ways and that they considered themselves abandoned or further injured by the compensation process. Many of these workers experienced financial hardship as a result.

Many workers had difficulty understanding the Board's legalistic decision letters, especially if English was not their first language.

Many workers (and employers) felt that they could not navigate the appeal process without an advocate or lawyer's assistance. Complex injuries often resulted in multiple decisions and a procedural complexity that defeated many.

In addition, many individuals, workers and employers, stated that they were not treated respectfully, that the Board was hard to communicate with and that the Board did not investigate or consider their evidence in decision-making. There appears to be almost no effective remedial avenues for stakeholders or individuals, especially injured workers.

Board decisions on medical issues were an area of particular conflict. Many felt that seriously injured workers were pre-maturely "plateaued" and forced back to work, only to experience re-

injury or further disability. Both workers and employers are highly dissatisfied with the Board's approach to Light Duties and the availability or reliability of medical evidence in such cases.

Shifting to a Worker-Centric Approach

A shift to a worker-centric delivery system must include treating all injured workers with dignity and offering effective RTW services for all stakeholders. This is an important goal especially for seriously injured workers whose work-caused injuries place a huge burden on individuals and their families. These are injured workers who are most in need of Board support and yet are, in effect, left behind by the current compensation system.

To make this shift, the Board requires improvement or change in three essential areas: communications, consideration of individual circumstances and evidence, and patient-centred medical care. The Review recommends:

1. That the Act be amended to include a Preamble and Statement of Purpose, as has been done in other jurisdictions. A statutory mandate inclusive of the principles of the Historic Compromise will assist the Board in making a cultural shift back to supporting all injured workers as an organizational goal.

2. Improved and Respectful Communications : That the Board improves its communications with all stakeholders through the use of email, plain English decision letters, and supported on-line and multilingual services. It is recommended that the Act require the Board to establish a Code of Conduct for Fairness and Service to all stakeholders.

3. Improved Consideration of Individual Circumstances and Evidence: That the Act be amended to require that Board decisions be made on the "merits and justice" of the case, as is done in most other Canadian jurisdictions. Board policy should provide guidance on the use of embedded disability guidelines in this context and also for consistency in decision-making. A number of recommendations are made to improve internal Board processes for the collection and weighing of evidence including having individualized assessment and case management for concussion injuries. Policy should state that injuries from violence in the workplace cannot be dismissed as just being "part of the job" as this is not consistent with the principles of the Historic Compromise.

4. Improved Patient-Centred Medical Care: The medical model of "patient centred" care is the recommended model for revising the Board's approach to health care services, to work towards the goal of maximum recovery for injured workers. Medical evidence must be accessible and credible and medical disputes resolved quickly, ideally through collaboration. Recommendations include:
    - Worker is treated by the caregiver of his/her choice. The carer delivers a treatment plan, minimally supervised by Clinical Services.

- Clinical Services is transferred out of its current role as adjudication support and re-established as a separate division, reporting to the CEO/Board of Directors. Clinical Services will consult with Doctors of BC on systemic medical issues.
- BMA's role within Clinical Services will be to consult and collaborate with treating physicians, claim owners and stakeholders where recovery or treatments are diverging from norms or Light Duty issues arise. BMA's will not be involved in provided opinions on adjudicative matters.
- Medical disputes will be addressed informally first, and if needed referred to the Medical Service Office for a case conference or an Independent Medical Examination (IME).

Changing the Service Culture to Be Fair and Accessible

One of the most common complaints was the complexity of the system. A complex claim could generate multiple appeals and procedural complexity spanning years. The courts have commented that the system was "unwieldy, inefficient and cumbersome", creating a "treadmill" of appeals and doing little to advance a worker's access to justice. The Review again found that certain types of injuries fared the worst, and that procedural complexity combined with adversity, delay and financial hardship created a "toxic dose" which often increased a worker's disability.

This appeal-oriented system of resolving disputes is also not compatible with RTW best practices.

The Review recommends that :

- Sections 96(2) and 96(5) of the Act be amended to allow the Board flexibility to reconsider and reopen its own decisions, as is done in other Canadian jurisdictions. As noted by the Provincial Ombudsperson in 2010 and again in 2019, section 96(2) in its present form, is administratively unfair.
- That the Review Division have wide jurisdiction to correct decisions.
- That a number of case management issues be addressed including incomplete decision making.
- That the Act be amended to provide WCAT with the statutory authority to reconsider its own decisions;
- That the Act be amended to provide WCAT with jurisdiction over issues involving the Charter and the Human Rights Code, consistent with the Review Division and a 90 day time limit, also consistent with the time limit to the Review Divison.
- That interest be paid to workers for certain types of retroactive benefits.

Return to Work and Vocational Rehabilitation Issues

The Report recommends that the Board adopt recognized "best practices" RTW guidelines, principles and guidelines, especially for Light Duties.

Other recommendations for an improved RTW processes include:

- Provide support for employers to conduct accommodation assessments through NIDMAR;
- Establish a process for the Board to recognize established disability management programs;
- Amend the Act to recognize the employer's Duty to Accommodate (DTA) based on the experiences and language of other jurisdictions;
- Establish training for Board staff on DTA and disability management
- Amend the Act to provide for a specialized appeal process for DTA issues

The Report also makes recommendations for Vocational Rehabilitation (VR):

- Amend section 16 of the Act to provide a clear statutory mandate for VR
- Amend Board policy to provide for flexibility in VR plans
- Amend the Act so VR decisions are appealable to WCAT
- Initiate VR specialized programs/resources for immigrants, older workers and younger workers

Specific Steps to Increase Stakeholder Confidence

Given this Review, the Report considers that the following steps are critical to increase stakeholder confidence and provides detailed recommendations regarding each step.

1. That a Fair Practices Commission (FPC) be created, independent of the Board and with ombudsperson authority and resources to address both individual complaints and systemic issues. Due to the high level of complaints, it is also recommended that two Deputy Commissioners be appointed, one for Claims matters and one for Prevention and Assessment matters.

2. That a Medical Services Office (MSO) be created to provide medical services to both stakeholders and decision-makers in the system, on request. This would include non-binding medical case conferences and arranging Independent Medical Exams (IMEs) from a roster of approved physicians, replacing the IHP process at WCAT.

3. That the Act be amended to provide a more accessible process for reviewing Board policy, consistent with the supervisory powers of the court. If the WCAT Chair reviews a policy, the WCAT determination may be reviewed by court through a judicial review. If the WCAT Chair determines that a Board policy is not consistent with the Act, the Board as well as well as the parties will have standing to appeal the matter to court.

4. That Board governance be balanced and fair and be seen to be so. It is recommended that the Board governance structure be changed to reflect the stakeholders in the Historic Compromise, as do most other jurisdictions, using the Manitoba model of 3 employer representatives, 3 worker representatives, and 3 public interest representatives with a neutral Chair. The Review also recommends that the directors of the Employers' Advisers Office (EAO) and Workers' Advisers Office (WAO) be included in the BOD as non-voting members as well.

5. Other steps for improving confidence include a review at least every 5 years, and that it include stakeholder consultation and public engagement, inclusive of injured workers. Also, that the Board develop an Education Office, an Occupational Disease Advisory Committee and that both the Board and FPO support community navigators.

Other Urgent Issues

Certain issues were identified in the public consultation process as being urgent in the compensation system. The Review address some, but not all, of the raised issues.

1. Re Activity Related Soft Tissue Disorders (ASTDs). B.C. is alone in treating gradual onset musculoskeletal injuries (MSIs) in arms, shoulders and hands as an Occupational Disease under section 6 of the Act. This approach creates a significant barrier to the acceptance of these very common workplace injuries. Further, this barrier adversely affects women more than men. In 2017, the ASTD acceptance rate was about 60% for men and about 35% for women. This adverse impact is likely due to the gendered nature of computer work. The Board practice with ASTD adjudication is strongly resistant to accepting that repetitive computer use can be a cause of an MSI in arms or hands. In 2017, only 19 claims for computer-related ASTDs were accepted. Other jurisdictions approach these conditions as gradual onset injuries which are more easily accepted, treated and prevented.

   The Review recommends that the Act be amended to specify that these MSIs be treated as personal injuries under section 5 of the Act. Board policy should then provide for an integration of the MSI Prevention guidelines into compensation policy and practice, that ASTD's now in Schedule B have an equivalent presumption and that the Board have stakeholder consultations re additional presumptions which may be necessary for some conditions in some occupations.

2. RE Psychological Injuries It is recommended that section 5.1 of the Act, now termed "Mental Disorders" be renamed "Psychological Injuries" and that a short-term psychological injury could be accepted without a DSM diagnosis for up to 10 days. It is also recommended that the word "predominately" be removed from section 5.1(a) (ii) and that 5.1(c) be amended to confine the "labour relations exclusion" in certain respects. It is also recommended that section 5.1(1.1) of the Act, providing a presumption of work causation for traumatic psychological injuries, be amended to include all occupations.

3. CPP Offset Another urgent issue from the consultations was the removal of the CPP deduction from the Act. This provision affects the most severely injured workers, who meet the "severe and prolonged" criteria for CPP disability and who have already had significant losses due their disability. They are among the most disabled and financially affected workers and the most deserving of full Board support.

4. Chronic Pain It is recommended that the new ICD-11 classification for chronic pain be included in the current Policy Review and that the new chronic pain policy provide for an individualized assessment of permanent impairment.

The Review made no recommendations regarding some other urgent issues raised in the consultation. The most common issue that was raised by permanently injured workers, particularly those with severe injuries, was to ask that permanent functional impairments (PFIs) be for life because their injuries were "for life". However, this matter is outside of the Review mandate as it was covered in another report (the "Boygo Report").

Other urgent issues were raised, but they require more data, research and consultation than was available in this Review. The Report recommends that the Board form Task Forces to address these two urgent issues by initiating the following:

1. Gathering data on the loss of earning capacity for permanently injured individuals and assess and make recommendations regarding the methods of compensation for permanent disability under section 23 of the Act; and

2. Investigating and costing the development of a workers' system of medical clinics in B.C. similar to the Occupational Health Clinics for Ontario Workers.

Indigenous Consultation

The Review was also asked to encourage participation from Indigenous stakeholders. Based on presentations to the Review, it is recommended that the Board engage community navigators and develop special guidelines for VR services to Indigenous communities, taking their perspectives and the Truth and Reconciliation Commission (TRC) recommendations into account.

It was noted that workers who are injured while working for a Band, have their injuries accepted at less than half of the general accepted rate. This is an area which needs further attention.

GBA+ Review

A GBA+ lens was used throughout the Review. In addition, certain matters were the focus in this area and the following was recommended:

1. That the Act be amended to provide discretion to the determination of Average Earnings for young, casual and temporary workers'
2. That the Board develop policy and procedures to address gender and identity based discrimination and ensure a psychologically safe workplace.
3. That the Board do gender based risk assessment for RTW and develop specialized responses to reports of violent sexual assault .
4. That the Board offer specialized support to workers with cognitive impairments and temporary foreign workers and farmworkers.

Summary

The Review involved a level of public engagement around workers' compensation which has not been seen for several decades. It paints an important picture of stakeholder concerns and levels of confidence which I have set out in detail in this Report.

The Review's recommendations focus on shifting the Board culture to a worker-centric system, so that the Board can perform its modern role in RTW and at the same time treat injured workers with the respect and dignity that they deserve. An independent Fair Practices Commission will monitor this situation and provide an Annual Report to the Minister.

RESTORING THE BALANCE

A WORKER-CENTRED APPROACH
to Workers' Compensation Policy

A Report to the Board of Directors
Workers' Compensation Board of BC

March 31, 2018

Paul Petrie

TRANSITION TOWARDS A WORKER-CENTRED APPROACH

Introduction

This report has been prepared for the chair of the Board of Directors of the Workers' Compensation Board[1] (Board). The terms of reference for this review asked that I review the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) and any other matters the chair may request including:

- assess in relation to other Canadian jurisdictions whether the current Board benefit levels fully reflect the financial losses suffered by injured workers;

- consult with external stakeholders including members of the Policy and Practice Consultative Committee (PPCC), representatives of the Workers' Advisers Office and Employers' Advisers Office, representatives of the Board's administration, and other parties that the chair may indicate; and

- recommend possible changes to the RSCM II policies to ensure a worker-centred approach wherever practicable.

The contract commenced on January 8, 2018 with the final report to the chair due on or before March 31, 2018. Given the limited timeline for the report, this is not a comprehensive review of claims policy. In order to identify the issues of greatest concern to representatives of the worker and employer communities I consulted widely with these stakeholders as part of this review. Between January 26 and March 8, 2018, I held 69 consultation meetings with members of the Board of Directors (9); Board staff (9); employer representatives (12); worker representatives (19); Ministry of Labour (4); other (5).

I also had an opportunity to meet with the 40+ employer representatives who attended my presentation to the Employers Forum on February 23 and the 9 members of the BC Federation of Labour compensation committee who attended my February 5 session. In almost all cases I met at the workplace of the person consulted. Appendix A contains a list of individuals I consulted in this review. It was on the basis of these consultations

[1] now operating as WorkSafeBC. The Act refers to the Workers Compensation Board as the legal entity under the Act and I refer to the WCB or "the Board" to identify the overall workers' compensation system covered by the Act. "The Board" is also the common term used in the *Rehabilitation Services and Claims Manual* to refer to the Workers' Compensation Board and the WorkSafeBC administration.

that I identified the issues addressed in this review and developed the policy proposals for the consideration of the Board of Directors.

I wish to recognize the willingness of representatives of both the worker and employer communities to share their carefully considered views and proposed solutions. I also acknowledge the full cooperation of the Board's administration in providing information, analysis, insights and cautions to ensure that my efforts have the benefit of their experience and knowledge. While I fully appreciate the many contributions I have received in the course of this time-limited review, any oversights, errors or omissions are wholly my responsibility.

The focus of this review is on identifying policy options within the bounds of the current legislation for consideration by the Board of Directors to ensure a worker-centred approach that maximizes recovery from the workplace injury or disease and restores injured workers to safe, productive and durable employment.

I have organized the issues addressed in this review into the following general topic areas:

The Historical Context

My terms of reference direct me to assess whether the current Board benefit levels fully reflect the financial losses suffered by injured workers. To some degree Board benefit levels are determined by the provisions in the legislation and legislative considerations are not before me in this policy review. It is important to consider the degree to which the current adjudication of claims restores the financial losses suffered by injured workers in the historical context to provide some perspective on this issue.

The Historic Compromise which is the foundation of the workers' compensation system is based on a balance between worker and employer interests. Workers gave up their rights to sue negligent employers in exchange for no fault compensation funded collectively by employers and administered independent of government outside the court system. Maintaining the balance in the workers' compensation system that retains the confidence of both the employer and worker community is essential to the system's long-term survival. Where system changes upset the balance of interests between workers and employers, steps must be taken to restore that balance.

Maintaining the balance in the workers' compensation system has historically relied on periodic royal commissions to provide an independent review and to make recommendations to government to ensure the viability of the system. The last royal commission was carried out by Mr. Justice Gill who delivered the Royal Commission Report[2] on Workers' Compensation in British Columbia - *For the Common Good* - in January 1999. In that report he concluded that:

> The commission determined that, while deserving praise for fiscal responsibility, the Workers' Compensation Board of British Columbia has failed in its mandate to administer fair and equitable benefits to all injured workers, often those most in need of assistance. (page xix)

He also identified: "...severe shortcomings in leadership, lack of defined goals, poor performance evaluation and deficient accountability structures and processes." (page xx)

Following the Royal Commission Report, the newly elected Liberal Government commissioned a Core Services Review[3] of the workers' compensation system to review the law and policy which was carried out by Alan Winter. In addition, the government commissioned a second "Service Delivery Review" carried out by Allan Hunt from the US based Upjohn Institute[4]

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[2] FOR THE COMMON GOOD Final Report of the Royal Commission on Workers' Compensation in British Columbia, Judge Gurmail S. Gill Commission Chairman, Oksana Exell Commissioner, Gerry Stoney Commissioner

[3] Core Services Review of the Workers' Compensation Board, 2002

[4] "Why Not the Best", Service Delivery Review by H. Allan Hunt PhD of the US Based Upjohn Institute

The Winter Core Services Review provided the basis for Bill 49 introduced by the Liberal Government in 2002 to bring major changes to the British Columbia Workers' Compensation System. These changes were in response to strong advocacy from the employer community based on the contention that the Workers' Compensation Board had become economically unsustainable. The British Columbia economy had been through a down turn in the 2000-2001 recession, impacting the Board's investment portfolio that resulted in a projected unfunded liability.

The former government introduced Bill 49 to address the concerns advanced by employers. During the May 16, 2002 second reading of Bill 49 the Minister of Skills Development and Labour raised concerns about the financial impact on the Board of the continuation of the benefits levels then in place and outlined the following goals of Bill 49:

> The goals of this bill are to restore the system to financial sustainability by bringing costs under control, to make the system more responsive and to maintain benefits for injured workers, which are among the highest and best in Canada, while ensuring fairness for workers and employers. (Hansard, Volume 8, No. 3 at page 3547)

The primary purpose of the amendments to the Act that became effective on June 30, 2002 was to reduce the costs of workers' compensation benefits to address what the government had concluded was required to achieve a more financially sustainable system in the future. Interestingly the Board had an operating surplus of $571 million in 2002.

The changes enacted by Bill 49 and subsequent initiatives included:

- A dramatic reduction in loss of earnings pensions by limiting access to only exceptional cases.

- A major reduction in resources devoted to vocational rehabilitation assistance to help workers return to work.

- A new limitation in lifetime permanent impairment pensions to age 65 unless the Board was satisfied that the worker would have retired at a later date.

- A reduction in compensation benefits from 75% of gross earnings to 90% of net earnings resulting in a general reduction in wage loss benefits.

- The reduction in the Consumer Price index to the CPI rate less 1% with a cap at 4%.

- Increased restrictions on the manner of determining a worker's wage rate.

- A 75-day limit on the ability to review and re-adjudicate prior decisions even if subsequent evidence challenged the validity of that decision.

- The imposition of binding policy to limit decision makers' ability to exercise discretion on the basis of the merits and justice of the case.

- Elimination of the Board's Appeal Division that applied remedial jurisdiction to resolving appeals and the creation of the external Workers Compensation Appeal Tribunal that was bound by Board policy.

- Introduction of a computer-assisted case management system that focused more on the application of policy to claims adjudication and less on the merits and justice of the individual worker's case.

In 2010 the Board again retained H. Allan Hunt to assess the Board's progress on the recommendations he made in his 2002 review in light of the legislative changes introduced in 2002. His May 2010 report[5] summarized evaluation of a range of service delivery measures including benefit adequacy, return to work outcomes and timeliness of claim processing. He noted significant problems with the launch of the computerized claims management system which he attributed to implementation challenges that would likely be resolved with time. Hunt also reviewed the Board's progress with his prior service delivery recommendations and concluded:

> WorkSafeBC has successfully transformed itself into a customer-oriented service organisation in the past decade. In my opinion, this is due primarily to the consistency of the leadership at WorkSafeBC and the unwavering focus of that leadership on the goal of service quality. The transformation may not be 100 percent complete yet, but the contrast with the organisation that I first encountered in 1991 is very striking indeed.

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[5] Service Delivery Core Review: A Reappraisal, May 2010, H. Allan Hunt, PhD W.E. Upjohn Institute, Michigan, USA

Hunt qualified his findings somewhat by noting that the context in which his 2010 review was carried out covered the period 2002 to 2008 when the British Columbia economy was in a strong growth phase with unemployment dropping from 8.5% in 2002 to 4.6% in 2008. During that period the Board's operating surplus averaged approximately $500 million. However, the world-wide recession that occurred in 2008 saw the unemployment rate rise from 4.6% to 7.6% in 2009. He indicated his review concentrated mainly on the 2002-2008 period.

The Board also commissioned a series of studies with the Canadian Institute for Work and Health to review the impact of Bill 49 on benefit adequacy and equity.[6] The study reported on post-accident earnings and benefits adequacy and equity of long- and short-term disability claims. The methodology compared the benefits injured workers received under the pre-Bill 49 policy with the benefits they would have received under the Bill 49 changes. The study looked at the impact of three changes introduced under Bill 49: the change to 90% of net earnings, the reduction in the application of CPI, and the limitation of loss of earnings pensions to only those cases considered "exceptional". On the basis of these three factors, the authors concluded that for long term pension benefits:

> Overall, the move to Bill 49 resulted in reduced benefits. For the entire sample the reduction was 15%.

The greatest impact was to injured workers in the 50-59 age bracket with the earnings replacement rate at 82% well below the target rate of 90% of their pre-injury earnings. The authors indicated this age bracket was the most vulnerable to the changes introduced in Bill 49. The authors did not factor in the impacts of the inclusion of Canada Pension Plan benefits, and the limitation of loss of function pensions to age 65. They pointed out that these impacts, especially for older injured workers, would show even greater loss of benefits.

The authors recommended a more worker-centred approach with greater consideration of individual experiences of these workers and contextual factors that affect them, since injured workers with similar impairment levels may have dramatically different earnings recovery patterns.

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[6] "WorkSafeBC Study Report I: The Impact of Bill 49 on Benefits Adequacy and Equity," July 2011; Emile Tompa et. al., Institute For Work and Health.

The Board conducts quarterly surveys of both employers and workers to gage the level of their "overall experience" with the Board. Approximately 80% of surveyed workers rate their overall experience with the Board as good or very good. This has improved from 74% in 2011. Approximately 83% of employers rate their satisfaction as either good or very good.

These indicators suggest that the Board is meeting the expectations of a large majority of workers and employers. A majority of the claims are being handled well. However, there is still a significant percentage of both employers and workers for whom the Board is not meeting their expectations. The Board's senior staff acknowledge that there is still a significant number of workers and employers where the Board could be doing a better job at providing the necessary supports to maximize recovery and restore the injured worker to safe, productive and durable employment.

Comparison of benefits with other jurisdictions

The terms of reference directed me to assess whether the current Board benefit levels fully reflect the financial losses suffered by injured workers in relation to other Canadian jurisdictions. Inter-jurisdictional comparisons are challenging, since each province has its own legislation and policy for interpreting and applying that legislation. The Association of Workers' Compensation Boards of Canada (AWCBC) provides the most carefully developed inter-jurisdictional comparisons with explanatory notes where comparisons require qualification.

Appendix B contains some of the key comparisons based on data collected and analyzed by the AWCBC. Calculation methodology for these measures are detailed on the AWCBC website. It is beyond the scope of this time-limited review to go beyond the readily available information on comparative benefit levels.

Table 1.1 provides inter-jurisdictional comparisons of the incidence of time loss claims, injury frequency rates, average claims duration, and permanent impairment ratings. The following summarizes the information in that table.

Time loss frequency rates:

- British Columbia has the 2nd highest injury frequency rate at 2.20 claims per 100 person years of employment.

Average duration of claims:

- British Columbia has the 4th highest composite duration of time loss claims of the nine jurisdictions reporting at 70.9 days.

Average permanent impairment rating:

- British Columbia ranks 8th (9.6%) out of the 11 jurisdictions reporting on the average impairment rating for permanent disabilities with Ontario and Quebec showing a higher average rating.

Table 1.2 includes a comparison of:

Maximum insurable earnings for 2016:

- BC has the 4th highest insurable earnings at $78,600. Manitoba has no maximum and Alberta and Northwest territories ranks second and third.

Basis for calculating earnings benefits:

- All provinces and territories now base earnings benefits on a percentage of net earnings. Of the eleven jurisdictions reporting, six including British Columbia base earnings benefits on 90% of net earnings. Five base earnings benefits on 85% of net or lower.

Permanent disability benefit limits:

- British Columbia has the third highest maximum amount ($4,486) for total permanent disability benefits for the seven jurisdictions reporting. Four provinces have no minimum for permanent disability. British Columbia has the lowest minimum ($1,428.70) of the four provinces that have established a minimum for permanent total disability.

Vocational Rehabilitation/Duty to Accommodate:

- Table 2 (page 77) provides an inter-jurisdiction comparison of return to work - duty to accommodate provisions contained in the statutes of different jurisdictions. British Columbia is the only major province that does not have a statutory duty to accommodate injured workers. Northwest Territories and Nunavut also do not have a statutory duty to accommodate in their legislation. This has implications for some of the key recommendations in this review.

An overall assessment based on this data shows that the British Columbia Workers' Compensation Board is generally in the middle of the pack when comparing benefit lev-

els and structures with other jurisdictions. The current benefit levels are rooted in the statutory changes enacted in 2002 by the previous government.

The changes enacted in 2002 focused primarily on reducing the costs resulting from injury and illness and has succeeded in achieving this fiscal objective. The successes have been achieved largely through a policy-driven case management system. While this approach has apparently worked for the average claim where there are no complications, it has not always worked well for more complex claims that do not fit the expected profile for the particular diagnosis being adjudicated. In those cases, the worker's recover is expected to fit into the established profile and when it does not, the supports needed for the worker's recovery are often not provided and that worker is left behind by the system.

It is apparent from the research provided by the Institute for Work and Health that the changes introduced in 2002 have impacted some groups of workers more than others. These vulnerable workers have experienced a disproportionate burden of the impacts of the cost-savings initiatives. This is not an unexpected result of a policy driven case management system that is designed to provide average justice based more on adjudicating the diagnosis and less on considering the relevant circumstances of the individual worker.

The available evidence indicates the current case management system does not fully compensate some injured workers for the losses resulting from the injury or disease. This is particularly the case for older workers with permanent disabilities that significantly impair their earning capacity. I address this issue in the next section of this report.

A WORKER-CENTRED APPROACH TO DECISION MAKING

The second provision in my terms of reference is to recommend possible changes to the *Rehabilitation and Claims Services Manual* (RCSM II) policies to ensure a worker-centred approach to policy issues wherever practicable. A worker-centred approach for injured and disabled workers is one that takes into consideration the worker's individual circumstances in applying policy and making decisions about benefit entitlement and rehabilitation measures. It is designed to maximize the worker's recovery from the injury or disease and to restore as close as possible the worker to his pre-injury employment status without a loss of earnings.

The Merits and Justice of the Case

Section 99 of the Act provides the foundation for all decisions made under the Act. That section states:

> **99** (1) The Board may consider all questions of fact and law arising in a case, but the Board is not bound by legal precedent.
>
> (2) The Board must make its decision based upon the merits and justice of the case, but in so doing the Board must apply a policy of the board of directors that is applicable in that case. [7]
>
> (3) If the Board is making a decision respecting the compensation or rehabilitation of a worker and the evidence supporting different findings on an issue is evenly weighted in that case, the Board must resolve that issue in a manner that favours the worker.

Subsection 99(2) is the pivotal provision for considering a worker-centred approach. Bill 49 amended section 99 in 2002 by adding the phrase: "but in so doing the Board must apply a policy of the board of directors that is applicable in that case." The purpose of that addition was to bring a greater degree of consistency to decision- making. Following the statutory change the Board brought in a new policy manual to address the

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[7] the citation of section 99(2) in policy #2.20 has a minor typographical error. Section 99(2) in the Workers Compensation Act states that: "The Board must make **its** decision based upon the merits and justice of the case...". The policy misquotes section 99(2) to read, "The Board must make **a** decision based on the merits and justice of the case..."

changes in the legislation and to place a greater emphasis on the application of policy and the direction to Board officers to carry out that policy.

For example, with respect to referrals of a claim for permanent disability consideration, the pre-2002 policy #96.20 provided discretion to the decision-maker to refer a claim for assessment of a "potential permanent disability" to the Disability Awards Department for an assessment based on the evidence of the worker and/or the evidence of the treating physician. The disability awards officer would arrange for a medical examination and then decide whether there was a permanent disability based on the permanent functional impairment assessment.

In the current version of the RSCM II, policy #96.20 has been completely removed from the manual. The replacement policy #96.30 now simply reads:

> The Board determines whether an actual or potential permanent disability is accepted on a claim.

This may result in a greater degree of consistency in referrals to disability awards, but it does not specifically require the Board to take into consideration the evidence of the worker who experiences the impact of the disability and the evidence of the treating physician who has direct clinical evidence of the nature and extent of the worker's impairment resulting from the injury.

Policy #2.20 in the RSCM II indicates that:

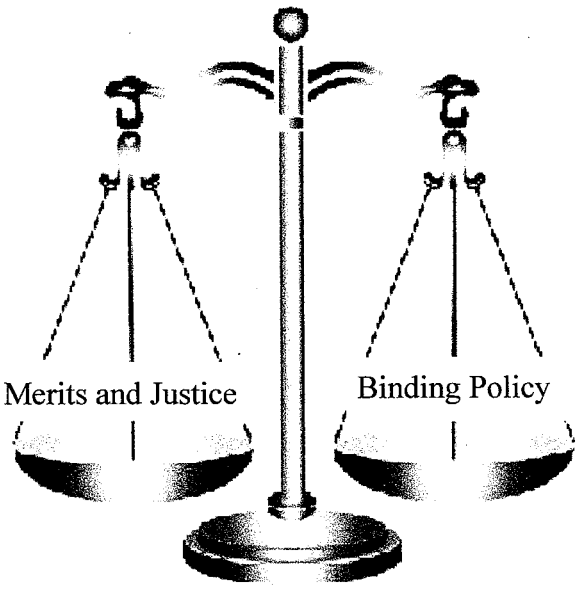
> Each policy creates a framework that assists and **directs** the Board in its decision-making role when certain facts and circumstances come before them. If such facts and circumstances arise and there is an applicable policy, **the policy must be followed**. (Emphasis added).

While the policy still provides for the Board to take into account the relevant facts and circumstances, the change to section 99(2) has made policy binding and has placed a greater emphasis on the application of the policy and relatively less emphasis on consideration of the facts and circumstances. This approach is reinforced in policy #2.20 as follows:

> All substantive and associated practice components in the policies in this Manual are applicable under section 99(2) of the *Act* and must be followed in decision-making.

Prior to 2002 Board policy provided "adjudicative guidance" and so the individual circumstances - the merits and justice of the case - could provide a basis for exercising a greater degree of discretion. The introduction of binding policy has reduced the ability of decision-makers to apply the merits and justice of the case to the decision-making process. Binding policy also facilitates the use of a computerized case management system to guide claim investigation and decision-making, sometimes without sufficient consideration of all the circumstances from the worker's perspective.

Restoring The Balance



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

1. **I recommend that the Board of Directors consider amending policy #2.20 to explicitly incorporate the requirement in section 99(2) that,**

"the Board must make its decision based on the merits and justice of the case." That amendment can provide for the adequacy of the investigation of the relevant facts and circumstances of the issue to be decided and take into consideration the evidence of the worker in all cases.

The focus on managing the claim primarily by reference to policy requirements rather than identifying the broader objective of determining what is needed to restore the individual worker to safe, productive and durable employment has left too many workers without a suitable job to return to and without adequate financial compensation to cover the loss where that employment is not reasonably available.

Providing the necessary supports to promote maximum recovery and achieve safe, productive and durable employment requires a more worker-centred approach to managing the claim especially for the more complex cases that don't fit neatly in the case management system. The inability of the case management system to fully identify and address the individual barriers that are impacting the injured worker's ability to return to a job that restores his or her pre-injury earnings often results in a disputed claim and a resort to the more adversarial appeals system. The delay in resolving the matter in dispute often means that finding a timely, workable solution is lost.

A case management system is an important component of an efficient workers' compensation system to ensure a level of consistency to decision-making. However, where that system does not have sufficient flexibility to consider the merits and justice of the individual worker's case, it erodes the principle of fairness and equity that is integral to the worker community's confidence in the system. When the workers' compensation system fails to provide fair and equitable compensation benefits, especially to the most seriously injured and vulnerable workers, corrective action is required. Incorporating a more worker-centred approach within the case management system is the most effective approach to address these inequities.

MEDICAL EVIDENCE AND EVALUATION OF DISABILITY

The foundation of entitlement to workers' compensation benefits is medically confirmed disability arising out of and in the course of employment or due to the nature of the worker's employment. Section 5(2) of the Act provides for compensation where the worker is disabled from the work at which he or she is employed. This determination is made initially by the worker's treating physician or qualified medical practitioner on the Board's Form 8 and Form 11. For most cases with a straight-forward diagnosis, this is sufficient to process a short-term wage-loss claim.

Some employers express concern that the medical evidence provided by treating physicians is insufficient to document the limitations and restrictions resulting from a compensable injury and that the physician often serves as an advocate for the patient, simply repeating the worker's position. They also contend that it is difficult for a physician to provide a thorough evaluation in the short time allotted to medical treatment under the Medical Services Plan.

Worker representatives contend that the worker's physician is in the best position to identify the nature and extent of the disability based on their clinical evaluation. They express concern that the Board medical advisors often substitute their opinion over that of the treating physician without the benefit of an in-person examination or direct clinical evaluation.

The Board recognizes that it is important to secure quality medical evidence to ensure a fair and objective adjudication. The Board's chief medical officer has recently developed an accredited one-hour in-service training session for treating physicians with a focus on principles of disability management and safe return to work. The Board is also currently reviewing and revising the Form 8 and Form 11 to improve the utility of the medical information provided by treating physicians. There is recognition, however, that for the more serious injuries and complex diagnoses more information than can be provided on the basic forms would enhance the reliability and fairness of the decision-making process.

Ontario has addressed the issue of the availability and adequacy of trained community-based medical practitioners with expertise in occupational medicine by establishing a number of Occupational Health Clinics for Ontario Workers (OHCOW) in Hamilton, Toronto, Windsor, Sudbury, Sarnia, Thunder Bay and Ottawa. For over 25 years these clinics have provided medical diagnostic services for workers who may have work-relat-

ed health problems and are funded through the Ontario Ministry of Labour. The clinics are staffed by an inter-disciplinary team of nurses, hygienists, ergonomists, researchers, client service coordinators and contracted physicians.

These clinics provide a community-based, worker-centred approach to medical evaluation that is lacking in British Columbia. The mission of the OHCOW clinics is "to protect workers and their communities from occupational disease, injuries and illnesses; to support their capacity to address occupational hazards; and to promote the social, mental and physical well-being of workers and their families." In my view, British Columbia has much to learn from this model and the Board of Directors may wish to consider implementation of a similar model in BC.

The Ontario Workplace Safety and Insurance Board (WSIB) has introduced a functional abilities form (FAF) paid for by the WSIB that provides a more detailed evaluation of the worker's abilities and limitations. The clinical evaluation derived from this form provides a more reliable basis for determining the nature and extent of the impairment and resulting disability. It also provides a more substantial basis for determining what alternate duties the worker can perform when the injury prevents a return to the pre-injury job.

I propose a somewhat similar "Abilities and Limitations Form" be adopted by the Board. Such a form would not be necessary in the large majority of cases with a straight forward diagnosis with little or no time loss. However, for complex injuries and challenging diagnoses, the completion of this form would provide the most cost-effective clinical medical evidence at the outset of the claim to guide treatment and provide an informed basis for determining appropriate return to work options. The case manager would be in the best position to determine when this enhanced clinical evaluation is required. The payment for this more thorough clinical evaluation could be made under BCMA fee code 19907 or other code item the Board considers appropriate.

A copy of the form could be provided to the worker by the physician at the time of the clinical evaluation. The Board could provide the employer with necessary information from the form to guide placement in suitable alternate duties where the worker is unable to return to the pre-injury employment.

In order to provide a more complete clinical evaluation in appropriate cases and to guide return to suitable employment:

2. **I recommend that the Board of Directors support development of an "Abilities and Limitations Form" for completion by the treating physician at the request of the Board on a timely basis in appropriate cases to be paid out of the accident fund.**

Timely resolution of medical disputes

Prior to 2002 Medical Review Panels (MRP) under section 63 of the Act provided a process for resolution of medical disputes in complex and difficult cases at any adjudicative level within the decision-making process. The access to a MRP required a physician to certify a bona fide medical dispute and resulted in an appointment of a 3-person panel of physicians from a list of independent specialists: one chosen by the worker, one chosen by the employer, and a chair appointed by the Board. The MRP would examine the worker and provide a certificate of findings to resolve the dispute. The process was administratively complex, and it routinely took over a year to get a certificate of findings from the MRP. The medical findings were binding on the Board.

As a result of legislative changes in 2002 section 63 of the Act was repealed and no general provision was made for resolving medical disputes. The legislature did provide a mechanism under section 249 of the Act authorizing the Workers' Compensation Appeal Tribunal (WCAT) to provide assistance from an independent health professional (IHP) from a list established by the chair of WCAT. A WCAT panel may request a report from an IHP with terms of reference and questions to address the medical issue under consideration in the appeal. The panel will consider the IHP report when making its decision after providing the parties to the appeal an opportunity to make submissions on the report.

While the IHP process works well for WCAT in addressing medical issues in question, it does not offer a mechanism for resolving medical issues in dispute at other levels of decision-making. It is generally left to the parties when a medical dispute arises to secure a medical-legal opinion from a physician of their choice. When the worker or employer is able to obtain such an opinion, it is most often considered at the WCAT level long after the medical issue in dispute arose. This forces the parties in an adversarial process and delays timely adjudication of the issues in question.

The adversarial process is generally a non-therapeutic method of resolving medical issues in dispute often to the detriment of the worker and the recovery process. Securing

a medical legal opinion is also expensive and often difficult for an unrepresented worker to obtain.

Under the current case management approach, standardized return to work guidelines are used to support the management of claims and Board medical opinions often rely to some degree on these guidelines in formulating medical opinions.[8] Prior to the reliance on the case management system, Board medical advisors would more regularly conduct in-person examinations to provide a clinical evaluation as the basis for their opinions.

A medical dispute most often arises when the opinion of a Board medical advisor or consultant differs from the opinion of a treating physician or specialist. This dispute is compounded from the perspective of the worker and his or her treating physician where the medical advisor's opinion is made without the benefit of an in-person clinical exam. In my view the merits and justice of the case are best determined where there is reliable clinical evidence to support the opinion.

Where a clear medical dispute exists and a worker's physician provides sufficient reasons to clearly identify the basis for that dispute, an independent medical examination (IME) can provide a mechanism to resolve that dispute without the delays and adversarial stances that attend the review and appeal process. An early resolution of these disputes wherever possible can build confidence in the decision-making process and minimize the non-therapeutic consequences of the adversarial process. Like the IHP reports, the IME would not be binding on the decision-maker, but would provide persuasive clinical evidence to consider in resolving the issue in dispute.

This approach has some challenges. It would need to be administered in a way that is seen to be reasonably independent of the claims decision-making process. It would also need to be time-sensitive to provide an IME within 45-60 days of a decision in dispute to enable the case manager to consider whether it provided a basis for reconsideration of that decision.

The issue of where to locate the administration of the IME is a challenging one. This matter bears further review with involvement of the Board's Policy, Regulation and Research Division and the Board's chief medical officer. The organization in the workers' compensation system with the most experience and expertise on independent medical evaluation is the Workers' Compensation Appeal Tribunal (WCAT) on the basis of its di-

[8] The Board uses The ODG return to work guidelines to guide adjudicative practices.

rect involvement in the IHP process under section 249 of the Act and should be consulted on this issue. The resolution of the location of this process requires further consultation to explore the available options and to identify the most suitable and available one.

A roster of physicians prepared to conduct IMEs on an expedited basis could be compiled with assistance from the University of British Columbia (UBC) medical experts familiar with occupational medicine in consultation with the Board's chief medical officer. The goal of an IME process is to provide a mechanism to resolve established medical disputes, avoid unnecessary appeals and restore a greater degree of confidence in a fair decision-making process.

To achieve this goal:

3. I recommend that the Board of Directors consider establishing an independent medical examination (IME) process to assist in resolving established medical disputes.

Preliminary determinations and expedited medical treatment

The Board currently has policy #96.21 which provides income support where there is a significant delay in determining the eligibility of a claim where the delay is not the fault of the worker. That policy specifies that "health care benefit bills will not be paid under a preliminary determination."

In my view, there should be some discretion in this policy to provide expedited medical treatment where the claim qualifies for a preliminary determination and the medical evidence indicates that the worker is at risk for a significant deterioration without timely and appropriate medical attention.[9] This flexibility in policy could be particularly important for workers with a claim for a mental disorder under section 5.1 of the Act where the medical evidence indicates timely treatment intervention is needed to avoid a significant deterioration of the condition and to reduce the risk of prolonged disability without that intervention.

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[9] Available research indicates that early intervention should be based on medical evidence in the individual case. For example see: National Institute for Clinical Excellence. Post-traumatic Stress Disorder (PTSD): The Management of PTSD in Adults and Children in Primary and Secondary Care.2005. (NICE Clinical Guidelines, No. 26.) 7, Early interventions for PTSD in adults.); Kearns, M. C., Ressler, K. J., Zatzick, D. and Rothbaum, B. O. (2012), EARLY INTERVENTIONS FOR PTSD: A REVIEW. Depress Anxiety, 29: 833–842. doi:10.1002/da.21997; also see: https://jamanetwork.com/journals/jamapsychiatry/fullarticle/1107447

Where the conditions for a preliminary determination are met:

4. **I recommend that the Board of Directors consider a method for approval of medical treatment on an expedited basis where clinical medical evidence indicates the worker is at risk of a significant deterioration without that treatment.**

VOCATIONAL REHABILITATION AND RETURN TO WORK SUPPORT

Early return to safe, productive and durable work is recognized as a key principle of the workers' compensation system. In his 1966 Royal Commission Report Mr. Justice Tysoe stated:

> The prime mission of those who administer workmen's compensation and the prime purpose of the Act is not to furnish financial benefits, but to promote and encourage measures for the prevention of injury to workmen in the course of their work and, should any be so unfortunate as to become disabled as a result of such injury, means for their rehabilitation and return to useful employment as soon as possible.[10]

Restoring an injured worker to suitable employment with the injury employer at the level of his or her pre-injury earnings is at the heart of a worker-centred approach and is the primary focus of this review.

British Columbia is the only province in Canada where there is no legislative requirement in its Act for employers to rehire injured workers (See Table 2 page 77 in Appendix B for details).[11] The question I must consider in this review is whether there are policy options available that will ensure a worker-centred approach to return to work. I believe there are.

Section 16 of the Act provides:

> To aid in getting injured workers back to work or to assist in lessening or removing a resulting handicap, the Board may take the measures and make the expenditures from the accident fund that it considers necessary or expedient, regardless of the date on which the worker first became entitled to compensation.

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[10] Commission of Inquiry Workmen's Compensation Act, 1966; pp 18-19

[11] The Northwest Territories and Nunavut also do not have a statutory obligation to re-employ/ rehire injured workers.

This legislation gives the Board wide latitude to enact policy to restore injured workers to suitable employment that is safe, productive and durable to minimize any financial losses that the worker will incur as a result of the compensable disablement.
The *British Columbia Interpretation Act also* directs that "every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". My recommendations are guided by this approach.

Duty to Accommodate

While the Act is silent on a duty to accommodate, employers have the duty to accommodate to the extent of undue hardship under the BC Human Rights Code.[12] And during the Board's vocational rehabilitation process employers, workers and unions are expected to comply with Human Rights legislation and associated policies.

There has been a new development in the law on this matter. In a February 1, 2018 unanimous decision of the Supreme Court of Canada (*Quebec v. Caron)*[13], seven judges of the court relied on the duty to accommodate in Human Rights legislation in Quebec and ruled that "...Quebec employers have a duty under the province's injured workers' legislation to reasonably accommodate those injured in the workplace — even though that duty is not expressly mandated by the statute."[14] (emphasis added)

Whether that decision will have a direct impact on the BC Board's obligation to support a "duty to accommodate" under Human Rights legislation is a matter for the courts to decide. However, the reasons in the SCC judgement offer compelling guidance to speak to this issue in Board policy. The Board has a clear commitment under section 16 of the Act to support measures to restore injured workers to safe, productive and durable employment with whatever measures and expenditures from the accident fund it considers necessary and expedient.

The first lesson from *Caron* is to reinforce the principle and goal of restoring the injured worker to long-term employment with the injury employer at no loss of earnings or em-

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[12] Human Rights Code [RSBC 1996] Chapter 210

[13] Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron; 2018 SCC 3 -Case number 36605

[14] Supreme Court 'integrates' duty to accommodate into Quebec's injured workers' legislation, February 01, 2018

ployment status wherever possible. The term "accommodation" is generally used to refer to a durable placement that is not transitory. This is contrasted with what is often referred to as light duty or selective employment which is a transitory process to a temporarily disabled worker although it may also assist that worker in securing accommodation to suitable and durable employment in the long term.

The second lesson from *Caron* is that it is important for the Board to respect the jurisdiction of the Human Rights Tribunal while at the same time meeting its own responsibility to workers under section 16 of the Act. The Human Rights Tribunal has a primary responsibility and the appropriate tools to adjudicate the duty to accommodate under their legislation and the Board should not infringe on that jurisdiction. The Board must respect the rights and obligations of employers and workers under the Human Rights legislation and must be transparent in articulating that respect.

The final point I take from *Caron* is that the Board's support to employers and workers in meeting their obligations under the duty to accommodate should harmonize to the extent possible with that obligation under the Human Rights legislation without infringing on it or interfering with it. This approach is consistent with the Board's current commitment under section 16 of the Act. It can also assist the worker and employer in achieving a just accommodation in a way that avoids a protracted and expensive adversarial dispute before the Human Rights Tribunal.

In light of *Caron*, it is important for the Board to explicitly recognize the duty to accommodate under the Human Rights legislation while respecting the separate jurisdiction of the Human Rights Tribunal to enforce its legislation without interference from the Board.

Board Policy for Vocational Rehabilitation (VR)

Board policy for VR is set out in Chapter 11 of the RSCM II. Given that the Board has broad discretion under section 16 of the Act, it is helpful if these policies as a whole promote VR practices which support key goals noted above. I make recommendations regarding specific VR policies as follows:

Policy C11-85: Principles and Goals

Board policy C11-85.00 provides a general overview to the Board's commitment to quality rehabilitation and outlines the principles and goals of vocational rehabilitation under section 16 of the Act.

In order to emphasize the importance of establishing a more worker-centred approach to this policy I offer the following recommendations for the Board of Directors' consideration under policy C11-85.00:

5. **I recommend that the Board of Directors consider enhancing the Board's approach to "Quality Rehabilitation" by amending policy C11-85.00 emphasizing an approach which may be summarized as follows:**

   Quality rehabilitation recognizes that a safe and early return to work that maintains the dignity and productivity of a worker plays an important role in the worker's rehabilitation and recovery. The Board is committed to timely intervention to assist the worker and the employer achieve a successful return to work with the injury employer wherever possible including provision of accommodation supports and services where needed.

   Where a return to work with the injury employer is not possible, the Board will provide the necessary supports and services to assist in restoring the worker to suitable and available employment at the pre-injury earnings level wherever possible. Where re-employment results in a significant loss of earning capacity, rehabilitation services will assist the worker in securing compensation benefits that will minimize the losses resulting from the disability.

   The Board recognizes that there is a "duty to accommodate" injured workers under the BC Human Rights Code. The Board will carry out its responsibilities respecting the jurisdiction of the Human Rights Tribunal in addressing issues arising under the Human Rights Code.

6. **I also recommend that the Board of Directors consider amending the section entitled "Quality Rehabilitation" in policy C11-85.00 to include a commitment to support early return to safe, productive and durable work that minimizes financial loss to the worker and incorporates the duty to accommodate as much as possible.**

7. **I recommend that the Board of Directors consider amending the "Principles" in policy C11-85.00 to include a principle that vocational rehabilitation assistance may be initiated without delay in conjunction with medical treatment and physical rehabilitation where there is evidence of barriers to return to work with the injury employer.**

8. **I recommend that the Board of Directors consider including a principle that sufficient vocational rehabilitation supports will be provided to ensure that workers can successfully compete when they return to employment.**

Policy C11-85.00 also includes a section on "Goals" which could be amended to emphasize the Board's overriding commitment to support durable, long-term employment with the injury employer wherever possible. In support of this objective:

9. **I recommend that the Board of Directors consider including an overall goal for the Board's vocational rehabilitation program to provide the necessary supports and services to workers and employers to achieve durable, long-term employment with the injury employer wherever possible and, where return to suitable work with the injury employer is not possible, provide the necessary supports and services to assist in securing suitable alternate employment that restores the worker's pre-injury earnings where possible.**

It is not only important for the Board to articulate its commitment to recognize and respect the jurisdiction of the Human Rights Tribunal, but also to defer to that jurisdiction in appropriate circumstances. This is a complex and sensitive matter and should be carried out in a manner where the Board retains its responsibilities to continue to support the worker under section 16 of the Act.

It should also be recognized where the employer and the union are parties to an accommodation arrangement under the Collective Agreement, the same "duty to accommodate" issue may be addressed through the grievance/arbitration process. Although a decision by an arbitrator or the Labour Board does not oust the jurisdiction of the Human Rights Tribunal, it frequently renders it unnecessary.

Therefore, as a practical matter, it seems reasonable for the Board to adopt the same approach for all accommodation disputes, whether the dispute arises at Human Right Tribunal or through a grievance/arbitration proceeding.

One of the options the Board of Directors may wish to consider is that where a dispute regarding the "duty to accommodate" is established, either under the Human Rights legislation or under a collective agreement, that the Board make a "preliminary determination" on a rehabilitation plan under section 16 and Board policy #96.21. The Board could then base the rehabilitation plan on the accommodation if one is offered and on the lack of an accommodation if one is not offered. This approach would allow for review and reconsideration of the preliminary determination once the accommodation dispute is resolved without infringing the 75-day rule in section 96(5).

Policy C11-88.00 - Nature and Extent of Programs and Services

It is well established that maintaining the employment connection following an injury improves the likelihood of securing a suitable accommodated position with the injury employer. To facilitate this connection policy C11-88.00 could be amended to reinforce "early intervention" support:

10. **I recommend that the Board of Directors consider amending the "Early Intervention" section in policy C11-88.00 state that vocational rehabilitation assistance will be available to the worker to restore the employment connection with the pre-injury employer where possible as soon as the worker is medically able to participate in his or her own vocational future.**

Vocational rehabilitation plan

In keeping with the guidance regarding durable accommodation in the *Caron* judgement and where possible to limit the worker's loss of earnings:

11. **I recommend that the Board of Directors consider amending the "Vocational Rehabilitation" section of policy C11-88.00 to include the overall vocational goal of restoring the worker to safe, productive and durable suitable employment as close to his or her pre-injury earnings as possible.**

12. **I also recommend that the Board of Directors consider amending this section to include a commitment that the plan have a reasonable probability of achieving and sustaining the vocational goal over the long term.**

To provide a measure of flexibility with the vocational plan to ensure that the plan can be adjusted to the changing needs of the worker:

13. **I recommend that the Board of Directors consider amending this section of policy C11-88.00 allow the VR plan to be amended where there are significant developments in the vocational rehabilitation process, indicating the vocational goal is unlikely to succeed.**

Lastly, some confusion may arise in policy C11-88.00 as a result from the inclusion of the provisions for wage loss equivalency under the heading "Discontinuation of Vocational Rehabilitation Services" in this policy.

To support the VR goals in this policy, it is helpful to state what is often the practice - that there is a continuity of wage-loss equivalency where there is a significant gap between the discontinuation of temporary disability benefits and completion of permanent disability entitlement. Therefore:

14. **I recommend the Board of Directors consider adding a new heading "Payment of Wage Loss Equivalency Benefits" to this policy.**

15. **I also recommend that the Board of Directors consider amending policy C11-88.00 to specify that wage loss equivalency benefits may apply after temporary wage loss benefits have been concluded and suitable employment is not available while the worker is awaiting permanent disability assessment under section 23 of the Act or is awaiting or undertaking specific vocational programs.**

Policy #115.30 provides for exclusions for some types of claim costs from consideration under the employer's experience rating charges. For example, injuries covered by policies C11-88.10, *Work Assessments*, C11-88.40, *Training- on-the-Job*, and C11-88.50, *Formal Training* attract relief under section 42 of the Act.

The rehabilitation costs associated with restoring an injured worker to suitable employment with the injury employer are often far less than the cost of providing the training and supports necessary to place a worker with a different employer in a different occupation. The injury employer also incurs its own costs as part of meeting their accommodation responsibilities. A safe, durable accommodation by the injury employer can be considered a win, win, win situation:

- the worker gains the benefit of retaining his or her connection with the workplace and co-workers;
- the employer retains an experienced employee;
- and the Board benefits by reduced costs to the accident fund and reduced demands on staff resources.

To encourage and support the timely accommodation of an injured worker with the injury employer:

16. **I recommend that the Board of Directors consider provision for relieving the employer of the rehabilitation costs associated the accommodation under policy #115.30 so long as the accommodated employment is durable and long term. The employer should be relieved of the costs if the accommodation is considered successful 12 months after its inception.**

My recommendations for enhancing the level of engagement for vocational consultants in the system will require additional resources to accomplish this successfully. It will take more than additional positions to succeed. The Ontario WSIB undertook a similar initiative in 2012 that has been very successful. Ms. Evie DoCouto, WSIB Vice President, Return to Work Program, attributes Ontario's success to three factors: strong support from the WSIB leadership; collaboration with the workplace partners; and a professional vocational rehabilitation staff.

The WSIB utilized the disability standards developed by the National Institute for Disability Management and Research (NIDMAR) to build a cadre of capable vocational rehabilitation professionals to deliver their services. I would recommend that the BC Board continue to collaborate with the WSIB to gain insights from their successes and their delivery model.

Certified Disability Management Professionals have played a key role in the WSIB program's success particularly in handling complex cases. WSIB supports all their return to work specialists in achieving the internationally recognized CDMP certification through NIDMAR. The Board of Directors may wish to consider a similar commitment to professional certification.

Light duty and return to work

Section 5(2) of the Act provides:

> Where an injury disables a worker from earning full wages at the work at which the worker was employed, compensation is payable under this Part from the first working day following the day of the injury.

The payment of compensation is based on medically confirmed evidence of disability, and where the Board receives medical evidence that the worker is unable to continue at the work at which he was employed, compensation is payable. Selective/light employment is a subset of section 5(2) and does not automatically displace it because there is an offer of light duties.

It is generally accepted that the earlier a worker is able to return to safe and productive employment following an injury, the more likely he or she is to retain employment with the injury employer when full recovery or maximum medical improvement is achieved.

The offer of light duties by the employer often occurs immediately following the injury so long as the work is medically appropriate and productive. It has the advantage to the worker of continuing his or her wages without interruption. The employer gains from this arrangement because there is no payment of wage loss benefits to impact the employer's experience rating. The Board gains because the administration of a claim with no wage loss benefits is less complex. These "wins" are dependent on whether the light duty employment is safe and productive for the worker and will not slow the recovery or worsen the resulting disability.

When fairly administered, suitable light duty employment can play an important role in a worker's recovery and recognizes the value of maintaining an injured worker's positive connection to the workplace.

The current policy requires that:

- The worker must be capable of undertaking some form of suitable employment.
- To be suitable, the employment must be safe and must not risk further harm to the worker or slow his or her recovery.
- The work must be productive. Token and demeaning tasks are considered detrimental to the worker's recovery.
- Where the forgoing requirements are met within reasonable limits, the worker must agree to the light duty arrangement.

Where the worker and/or the worker's physician disagree that the light duties meet these policy requirements, the Board is required to investigate and determine the safety of the work after considering the medical evidence and other relevant information. The Board may initiate the investigation in response to notification by the worker or the employer or may initiate its own investigation where it considers further inquiry is indicated.

The policy specifies that the Board's evaluation will be based on, but not limited to, a detailed description of the employment being offered, including the physical requirements and detailed medical information outlining the workers medical restrictions, physical limitations and abilities. The Board officer then determines whether the light duty offer meets the policy criteria outlined above.

The current employer's report of injury (Form 7) asks the employer if modified or transitional duties are available to the worker and if so to provide a description of these duties in a 2-3 inch square box on the form. It would be more appropriate in light of policy #34.11 to request the employer provide a copy of the light duties that have been offered to the worker and ask if a copy of that offer has been provided to the worker. This will ensure that the Board has reliable information on which to initiate an investigation if one is required. Where a copy of the light duty offer has been provided to the worker, the Form 7 should also indicate whether the worker has been asked to provide that offer to his or her treating physician for approval of those duties.

Many large employers have well established disability management programs that provide suitable light duty employment on a proactive basis. The success of these programs depends on the employer's commitment to provide safe productive employment in accordance with available medical evidence and the worker's individual circumstances. Cooperation with the workplace partners including a union where one is available provides the basis for building a trust relationship for this program. Larger employers often have a greater degree of flexibility in arranging light duties. Medium and smaller employers don't always have this flexibility.

To assist medium and smaller employers with accommodating the injured worker in suitable light duties I recommend that the employers report of injury contain a new question after the question, "Have any modified or transitional duties been offered to the worker?" to read, "If no, can the Board be of assistance to the employer in arranging suitable employment for the worker?"

The Abilities and Limitations Form outlined in recommendation #1 provides a valuable supplementary source of clinical evaluation for determining the suitability of light duties offered by the employer. Where the physician's report of injury (Form 8/11) does not contain sufficient information to determine whether the light duty offer is safe and will not delay the worker's recover or worsen the condition, the board officer can provide the treating physician with the employer's light duty description and request an evaluation of the worker's suitability for those specific duties. In appropriate circumstances the Board can ask the physician to complete an Activities and Limitations Form to provide a more detailed clinical evaluation of the suitability of the physical requirements.

Policy #34.11 states:

> Should the Board determine that the worker's refusal is unreasonable, benefit entitlement is determined under section 30 of the *Act*. For example, the worker does not provide the selective/light duties to the attending physician or the worker refuses to return to work after the physician has determined the duties are suitable. Benefit entitlement will be adjusted effective the date the selective/light employment was suitable and available, as determined by the Board.

This policy is clear on how cases are handled where the worker unreasonably refuses to cooperate with the employer's effort to arrange light duty employment that complies with policy #34.11. In that case, the light duty is deemed to comply with section 30 on the date it was offered and benefits, if any, are paid accordingly. However, in my view this policy does not adequately address the situation where the worker has a reasonable basis to believe that the policy requirements have not been met. What is unclear in policy #34.11 is whether the worker continues to receive wage loss benefits while the investigation on the reasonableness of his or her refusal is carried out.

A worker-centred approach would not penalize the worker for raising a reasonable concern with respect to whether the light duty offer meets the policy requirements that was

sufficient to initiate an investigation. In my view, where the worker provides a reasonable concern about the viability of a light duty position and there is medical evidence confirming that the worker is disabled from the work at which he or she was employed, then wage loss should continue to be paid while the investigation is carried out. That is consistent with the requirements of section 5(2) of the Act and the requirements in policy #34.11. However, where the worker unreasonably refuses to cooperate with the employer's efforts to establish a viable light duty position that complies with policy #34.11, then deeming the light duty position when it was formally offered is appropriate and in accordance with the Act and the policy requirements.

This approach puts the onus on the Board to initiate and complete the investigation without delay. Where a reasonable dispute arises regarding the compliance of a light duty offer, the first step is for the employer to provide the Board with a detailed description of the employment being offered either at the initiative of the employer, or at the request of the Board officer where it is not otherwise provided by the employer. Where the medical evidence provided by the treating physician is not sufficient to resolve the matter, the Board officer can request that the physician carry out a thorough examination and complete the "Abilities and Limitations Form" as detailed in the "Medical Evidence and Evaluation of Disability" section of this report.

Where further investigation is required, it is up to the Board officer to determine the nature and extent of the investigation and to arrive a fair resolution for all parties. In my view, this is a critical point in the claim. The Board's initiative and support can determine whether the worker is accommodated by the employer or whether the Board's involvement will focus on assisting the worker in finding alternate employment with a different employer. The latter course is more uncertain, challenging and difficult for the worker, and incurs greater expense borne by the accident fund and ultimately the employer. The Board's involvement at this point can make the difference between a successful re-employment outcome with the injury employer or an ongoing Board engagement with the worker to find alternate employment, often accompanied by disputes, appeals and the non-therapeutic adversarial process.

To facilitate a successful non-adversarial resolution of a reasonable dispute over the suitability of light duties:

17. **I recommend that the Board of Directors consider amending policy #34.11 to provide for a careful investigation of the dispute and where appropriate engage a vocational rehabilitation consultant or occupa-**

tional therapist to meet face to face with the parties to facilitate an accommodation acceptable to both the worker and the employer where so directed by the case manager or requested by the employer or worker.

18. **I also recommend that the Board of Directors consider amending this policy to indicate where there is medical evidence that the worker is disabled from the work at which he or she was employed during the investigation process, the Board continue to pay wage loss benefits to the worker while the investigation is concluded.**

19. **Finally, I recommend that the Board of Directors consider a further amendment to indicate that where a successful accommodation is achieved after investigation, that the costs associated with vocational rehabilitation expenditures and with the associated wage loss payments while the investigation is being carried out be borne out of the accident fund generally and not charged to the employer's experience rating account. The authority for this cost adjustment is found in section 42 of the Act.**

Claim Suppression

During the course of my consultations some representatives of the worker community expressed concerns about what they consider to be misuse and in some cases abuse of light duties and in some cases bordering on claim suppression. These concerns included:

- threats of dismissal if the worker filed a claim for wage loss;
- assigned to non-productive "work" in the lunchroom;
- punch in on time clock then allowed to go home for the day;
- use of mandatory drug testing when reporting an injury as a means of suppressing a claim.

One representative contended that, "the difficulties people have in applying for compensation...had the effect of suppressing claims." Another representative submitted, "suppression comes more from the case managers, vocational rehabilitation consultants and [Board medical advisors]... than employers." I have included a first-hand case study in Appendix C which was submitted by a third representative to illustrate this point. The

case study of this firefighter with a PTSD condition also has relevance for two recommendations I make later in this review.

Some representatives urged me to meet with individual workers to investigate and confirm these abuses. I declined to do so. I consider engagement with and investigation of individual cases is beyond the scope of my mandate. However, I do not consider it appropriate to dismiss their concerns without comment.

It is contrary to section 177 of the Act for an employer to pressure a worker from reporting a claim to the Board. That section provides:

> An employer or supervisor must not, by agreement, threat, promise, inducement, persuasion or any other means, seek to discourage, impede or dissuade a worker of the employer, or a dependant of the worker, from reporting to the Board
> (a) an injury or allegation of injury, whether or not the injury occurred or is compensable under Part 1,
> (b) an illness, whether or not the illness exists or is an occupational disease compensable under Part 1,
> (c) a death, whether or not the death is compensable under Part 1, or
> (d) a hazardous condition or allegation of hazardous condition in any work to which this Part applies.

Interfering with a worker's statutory right to entitlement to compensation is a serious violation of the Act and may attract penalty consideration under section 196 of the Act. The Board has a statutory duty and fiduciary trust to workers to protect their right to make a claim free from interference by employers.

Section 13 of the Act also prohibits workers from agreeing to waive or forgo any benefit entitlement under the Act. That section states:

> A worker may not agree with his or her employer to waive or to forego any benefit to which the worker or the worker's dependants are or may become entitled under this Part, and every agreement to that end is void.

Policy # 94.20 addresses the employer and supervisor prohibitions under section 177 of the Act and the possibility of an administrative penalty that may be calculated on the basis of the criteria in item D12-196-6 in the Board's *Prevention Manual.* What appears to

be missing in policy #94.20 is adjudicative direction and guidance on what steps a board officer is to take when an allegation of a violation under section 177 of the Act is raised. Given the seriousness of a violation of section 177 of the Act and the complexity of the possible remedy under section 196 of the Act:

20. **I recommend that the Board of Directors consider amending Policy #94.20 to indicate where an allegation of a violation under 177 of the Act is raised, the Board officer will document that allegation and refer it to the Board's Legal Services Division for direction and guidance.**

The issue of claim suppression is fraught with allegations that are difficult to document. The very fact that these activities are not openly practiced is because they are prohibited by the Act. Where there are serious allegations of violations of section 177 of the Act, the Board has a duty to respond. However, the Board's response should be proportionate to the nature and extent of the problem. Determining the nature and extent of the problem is the challenge.

This problem has been addressed systematically by other workers' compensation boards. For example, the Manitoba Workers Compensation Board released a comprehensive report[15] that indicated claim suppression occurs in approximately 6% of workplace injuries, which represents approximately 1,000 claims per year. This empirically based study reported on four separate survey measures indicating that employer "overt claims suppression" ranged from 6.0% up to 29.8%. These findings led to measures taken by the Manitoba WCB to address this issue.

Given the importance of this issue and the difficulty in evaluating the nature and extent of this problem on an anecdotal basis:

21. **I recommend that the Board of Directors consider initiating an independent review of this issue by a qualified organization with a scientific methodology to determine whether and to what extent claims suppression is a significant issue in the BC workers' compensation system.**

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[15] "Claim Suppression in the Manitoba Workers Compensation System", Nov. 2013; Prism Economics and Analysis.

PERMANENT DISABILITY ENTITLEMENT

Referral for Permanent Disability Evaluation

The transition from temporary disability benefits to permanent disability benefits is a critical period in the claim for the injured worker. This transition typically occurs at "plateau" when the medical evidence indicates the worker has reached maximum medical improvement from the compensable injury and the remaining conditions have reached a plateau of recovery.

Under current policy, there is little guidance regarding decision-making procedures at this important point in the claim. The current practice is that the Board officer consider possible permanent disability entitlement at the time of plateau. It is the responsibility of a case manager to determine what permanent conditions are accepted on the claim and whether the claim should be referred to the disability awards department to assess the worker's entitlement for these accepted conditions under section 23(1).

If permanent conditions are accepted, the Board officer will also usually adjudicate whether the worker can return to his pre-injury job without assistance or whether there should also be a referral to vocational rehabilitation (VR) to explore employability options. Finally, at the time of plateau, the Board officer may or may not adjudicate whether the worker is entitled to a loss of earnings (LOE) assessment, based on whether his loss of earnings from his injury is "so exceptional". In practice, early LOE decisions may or may not be included in plateau decisions.

Ideally, prior to the termination of temporary disability benefits, the Board will have had an opportunity to determine whether the worker can return to work with the injury employer either to the pre-injury job or to some accommodated position with the injury employer. Where the worker is able to return to the pre-injury job, full-duties or with an accommodation, that is an indication that the worker may not need a referral to VR or may not be entitled to an LOE assessment. Where there is a clear indication prior to the plateau date that the worker is unable to return to work with the injury employer, an early referral to the vocational rehabilitation consultant to initiate a rehabilitation plan should be initiated if this has not already been done to avoid delays in the pension assessment process.

Prior to the changes to the statute in 2002, then policy #96.20 in the RSCM I offered guidance to Board officers regarding the approach used to refer cases to the disability

awards department for assessment of permanent disability or potential permanent disability. That former policy provided:

> To ensure consistent referrals of all cases where there is a potential disability, the Board officer is required to send the file to the Disability Awards Department for further evaluation where any of the following guidelines apply:
>
> 1. Where a medical report indicates that a permanent disability exists or that there is a possibility a permanent disability exists.
>
> 2. Where a worker indicates there is a permanent disability as a result of the compensable injury, or states there is an inability to return to employment as a consequence of the injury.
>
> 3. Where there is any other indication of a permanent disability or potential permanent disability.
>
> If there is any doubt about the existence of a permanent disability, these claims are referred to the Disability Awards Department for final consideration. Board officers, however, are expected to exercise discretion and common sense in deciding whether to refer a worker's claim to the Disability Awards Department, it is up to the Board officer to clearly delineate by memo the status of the claim and to confirm what conditions have been accepted.

Policy #96.30 in RSCM I also specified:

> It is the responsibility of Disability Awards Officers and Adjudicators in Disability Awards to determine whether a worker's injury or occupational disease has caused a permanent disability. They then decide the extent of the disability and calculate the worker's permanent disability award entitlement. Policy also provides that Disability Awards Officers and Adjudicators in Disability Awards must accept the final decision of the Board officer as to what conditions are accepted under the claim.

In 2004 a Board discussion paper 16 advanced a new approach and recommended that policy #96.20 be amended to read:

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16 See the Board's 2004 "Discussion Paper: Referral to Disability Awards."

> The Board officer determines when temporary total disability or temporary partial disability benefits are concluded, and whether an actual or potential permanent disability is accepted on the claim. These decisions are generally made on the basis of information supplied by a treating physician, qualified practitioner, consulting specialist or and/or the injured worker. Treating physicians and qualified practitioners are required to send periodic reports to the Board outlining the worker's condition. These reports include a question which asks specifically whether there will be any permanent disability resulting from the injury.
>
> In those situations where a Board officer determines that an actual or potential permanent disability does not exist, and this decision is contrary to the attending physician's opinion or the worker's own opinion on the matter, then a decision is to be provided to the worker, setting out the status of the claim. If the worker is not satisfied with the Board officer's determination, a review of the decision may be requested.
>
> If an actual or potential permanent disability is accepted on the claim, the Board officer will refer the file to the Disability Awards Department for an assessment of the extent of the disability.

In the current version of the RSCM II, policy #96.20 has been completely removed from the manual and specific reference to the evidence of the worker and the treating physician has been eliminated from the policy. Policy #96.30 now simply reads:

> The Board determines whether an actual or potential permanent disability is accepted on a claim.

The changes to policies #96.20 and #96.30 reflect the changes in Board practice, not just about who makes the permanent disability decision but also on what basis or evidence it is made. Under the current policy (#96.30), the Board officer makes this decision but there is no specific policy direction to seek the input of the worker or the treating physician on this decision. It is at this critical point in the claim when it is important to have policy direction on the nature and extent of the investigation to be carried out. Failure to ensure that all relevant evidence is considered prior to the Board officer making this important decision can lead to unnecessary reviews, appeals and referrals back to the Board for further investigations.

The lengthy delay to go through the appeal process just to have the evidence of the worker and treating physician fully and fairly considered takes an inordinate toll on the worker. The legal maxim "justice delayed is justice denied" applies. More importantly, the non-therapeutic impact on the worker to be forced into the adversarial process only to have the worker's evidence and the treating physician's evidence and opinion considered is the contrary to what a worker-centred approach should provide.

The evolution of policy #96.20 where the evidence of the worker and the treating physician were given a significant role to the current approach where the policy does not specifically refer to the role of the worker and physician's evidence is the difference between a worker-centred approach and a strict case management approach under the current policy.

In order to restore a more worker-centred approach to this important decision and to fully consider the evidence of the worker and the treating physician in making a decision to refer the claim for permanent disability for assessment:

22. **I recommend that the Board of Directors consider a new policy #96.20 to indicate that when the worker's injury is reaching maximum medical improvement and there is some evidence of a potential permanent disability, the Board officer will request that the treating physician or specialist complete an Activities and Limitations Form (ALF) with a copy to the worker and give the worker an opportunity to provide any further evidence regarding the existence of an actual or potential permanent disability.**

Where the worker continues to be disabled from performing the full duties of the work at which he or she was employed at the time of injury, this may be an indication that there is a level of ongoing disability from the injury.

23. **I also recommend that the Board of Directors consider amending policy to indicate that the Board officer will consider the evidence of the worker and the worker's physician and where there is substantial evidence from the treating physician and from the worker that the worker has a potential permanent disability, this evidence will be given significant weight unless there is conclusive evidence to the contrary. Where the Board officer determines that the worker has a permanent disability, the**

Board officer will refer the worker's claim to Disability Awards for an assessment of that disability under section 23(1).

Loss of Earnings Assessment

The mandatory method for determining a worker's permanent disability entitlement is contained in section 23(1) of the Act. As pointed out in policy # 39.00 the percentage of disability determined for the worker's condition under section 23(1)(a), is intended to reflect the extent to which a particular injury is likely to impair a worker's ability to earn in the future.

Section 23(3) of the Act provides the Board with a discretionary method to determine whether the assessment of disability under section 23(1) appropriately compensates the worker for the impact of the disability on the worker's ability to earn in the future. The addition of a new section 23(3.1)and (3.2) to the act in 2002 introduced a new prerequisite for considering a loss of earnings pension under section 23(3) of the Act. The provisions of section 23(3), (3.1) and (3.2) are reproduced below to provide reference for my consideration of this issue.

Section 23(3) of the Act provides if:

(a) a permanent partial disability results from a worker's injury; and
(b) the Board makes a determination under subsection (3.1) with respect to the worker;

the Board may pay the worker compensation that is a periodic payment that equals 90% of the difference between

(c) the average net earnings of the worker before the injury, and (d) whichever of the following amounts the Board considers better represents the worker's loss of earnings:
(i) the average net earnings that the worker is earning after the injury;
(ii) the average net earnings that the Board estimates the worker is capable of earning in a suitable occupation after the injury.

(3.1) A payment may be made under subsection (3) only if the Board determines that the combined effect of the worker's occupation at the time of injury and the worker's disability resulting from the injury is so exceptional

that an amount determined under subsection (1) does not appropriately compensate the worker for the injury.

(3.2) In making a determination under subsection (3.1), the Board must consider the ability of the worker to continue in the worker's occupation at the time of injury or to adapt to another suitable occupation.

The provisions in the Act may be summarized as follows:

First, there is an assessment of the worker's entitlement under section 23(1) of the Act to determine the nature and extent of the disability resulting from the injury.

Next, the Board makes a determination under section 23(3.1) as to whether the impact of the worker's disability on his or her ability to continue in the pre-injury occupation is "so exceptional" that the amount determined under section 23(1) does not appropriately compensate the worker for the injury. The "so exceptional" test, under section 23(3.2) requires the Board to consider the ability of the worker to continue in his or her occupation at the time of injury or to adapt to another suitable occupation.

If, and only if, the combined effect of the worker's occupation and the worker's disability resulting from the injury is so exceptional (under sections 23(3.1) and (3.2)) that an amount determined under section 23(1) of the Act does not appropriately compensate the worker for the injury, will the Board consider possible loss of earnings entitlement under section 23(3) of the Act.

The determination of the worker's disability resulting from the injury under section 23(1) is integral to the application of section 23(3.1) and (3.2) and logically precedes it. A plain reading of the Act does not require an application of the "so exceptional test" before the section 23(1) assessment of the nature and degree of the permanent disability. In fact, the reference in section 23(3.1) to "the worker's disability from the injury" is an indication that the determination of the assessment of the nature and extent of the worker's injury under section 23(1) should precede the application of the so exceptional test.

The two-step process for section 23(3) consideration

The Board has somewhat different policy requirements for each of the two steps involved in the determination of a loss of earnings pension under section 23(3), using pol-

icy #40.00 for determining matters under sections 23(3.1) and (3.2) and then policy #40.12 for determining matters under section 23(3). The use of different policies effectively creates a "two-step" adjudicative process for the worker, leading to complexity and delay. The actual terms of policy #40.00 at the first step have also been the source of numerous challenges at WCAT and in the courts.

The expansive role of policy #40.00 in the first step under section 23(3.1) and (3.2) was addressed at length in the BC Court of Appeal judgement in *Jozipovic v. British Columbia (Workers' Compensation Board)* 2012 BCCA 174. Following that judgement, the Board made some adjustments to policy #40.00 in response to the court's concerns.

More recently, in the BC Supreme Court judgement in *Shamji v. WCAT* (2016 BCSC 1352) Justice Voith detailed a range of concerns with respect to the Board's application of section 23(3.1) and (3.2) in determining the worker's loss of earnings pension and the amount of that pension. His first concern is that the first step in the assessment process - the decision on eligibility for an LOE pension can be negated in the second step on the "assessment" of that pension under section 23(3). Justice Voith observed:

> This is particularly curious, and I would say irrational, when the very issue of eligibility is predicated on a finding that an injured worker's loss of income is "significant" or his or her circumstances are "so exceptional" that an assessment of that loss is necessary or appropriate. [105]

He also observed:

> ...that the present process, or the way the process is implemented, has the prospect of excluding potentially meritorious claims for an LOE pension. It is equally possible that a worker would not meet the stage one eligibility threshold based on average incomes or figures, but would have done so if that worker's actual income had been used. [106]

Justice Voith went on to state:

> While these separate inquiries may be logical, the fact remains that, in combination, the overall scheme is unwieldy, inefficient, and cumbersome. This is particularly so when one considers that the Act is intended to serve injured workers. [109]

In a March 1, 2018, judgement the BC Court of Appeal [*Shamji v. Workers' Compensation Appeal Tribunal*, 2018 BCCA 73] three justices upheld the judgement below noting:

> The reviewing judge, expressing concern about the implications of his conclusion on the two- stage process, questioned why a worker would have to establish eligibility for an LOE assessment based on one set of figures, only to be subsequently told that he had no right to such a pension where the decision maker on that assessment chose to use different figures. He also questioned why a worker should go through these different stages given the length of time this matter had taken, with multiple hearings at each stage. [64]
>
> I certainly appreciate the observations of the reviewing judge. As this case demonstrates, the compensation system in the Act can be slow, cumbersome and frustrating to workers. However, part of this stems from the nature of a process that evaluates a worker's disability, provides vocational rehabilitation where appropriate, and assesses what losses have resulted from an impairment of earning capacity. An initial assessment of functional impairment under s. 23(1) is not made until a worker's injury has "plateaued". It is only after this has been done that consideration can be given to an LOE under s. 23(3). [67]

The BCCA judgement also acknowledged that a two-step process was permissible under the Act consistent with the prior BCCA judgement in *Preast v. Workers' Compensation Appeal Tribunal,* BCCA (September 9, 2015). The concerns of the court reflect some of the same concerns for a worker-centred approach.

In 2017 the Board's Workers' and Employers' Services Division initiated a review of the decision-making process for the section 23(3) loss of earnings. This initiative arose from recognition that there were inconsistencies in the decision-making process that were resulting in a high volume of reviews and appeals and a high rate of appellate returns that required further investigation and new decisions. In addition to the impact of the resulting delays for the worker, these returns were resulting in a significant amount of rework for vocational rehabilitation consultants.[17]

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[17] For example, the Division estimates there are approximately 3,000 vocational rehabilitation plans per year and approximately 1,000 LOE awards expected. There are also approximately 1,400 Review Division reviews per year in relation to vocational rehabilitation plans and section 23(3) decisions. A review of 846 Review Division decisions had a return rate of 42% for further information or investigation.

The Board is in the process of rolling out an improved decision-making process for section 23 loss of earnings cases following review of WCAT and Supreme Court decisions, discussions with Review Division representatives, and information from Board staff. The following recommendations are intended to complement and supplement the Board's initiative to develop a "Comprehensive Framework for Quality Decision Making" under section 23(3) of the Act. This "Framework" provides an important step forward to bring a more transparent and proactive approach to the decision-making process that will improve consistency to section 23(3) decisions and hopefully reduce appeals from these decisions.

Application of policy in section 23(3) appeals

The two critical terms to consider in the application of current policies are "suitable occupation" and "appropriate compensation." Clear and consistent definitions of these terms are necessary for adjudicative direction and guidance for implementing this very important provision of the Act that affects the most seriously disabled workers. It is also important that the two policies be consistent and integrated, to avoid the adjudicative difficulties and the barriers to workers noted by the courts.

"Suitable Occupation"

With respect to "suitable occupation," policy #40.12 outlines the considerations that the Board must take to arrive at a conclusion of employment that the worker could be expected to undertake over the long term including medical evidence of the limitations imposed by the disability as documented by the permanent disability assessment under section 23(1). As noted earlier Policy #40.00 provides a more general definition of suitable occupation.

In order to provide consistency in policy with respect to the determination of a suitable occupation:

24. I recommend that the Board of Directors consider amending the definition of suitable occupation in policy #40.00 to indicate that a suitable occupation is one that the worker has the physical ability to perform, has the necessary knowledge and skills to be competitively employed in that occupation given all the worker's circumstances, and actual employment in that occupation is reasonably available to the worker in the long term. It would also be helpful to reference policy #40.12 which

provides detailed guidelines in determining suitable and reasonably available occupations for a worker.

Appropriate Compensation/ "Significant Loss of Earnings"

Policy #40.00 provides that section 23(1) may not appropriately compensate a worker where the worker cannot continue in a suitable occupation with a "significant loss of earnings".

Policy #40.00 also provides that in determining whether a worker is experiencing a significant loss of earnings, the Board takes into consideration the difference between the worker's pre-injury earnings and the combined total of the worker's post-injury earnings and the amount awarded under the section 23(1) method of assessment. However, the policy does not provide a specific percentage of loss that would constitute a "significant" loss. That is left to policy directive C6-2 which states that the Board:

> ...recognizes that a "significant loss of earnings" exists where the difference between the worker's pre-injury earnings against the combined total of the post injury earnings and the amount in the section 23(1) award is at least 25%.... [and] "does not exist where the calculated result is 5% or lower.

That practice directive, which is not a policy of the Board of Directors, acknowledges that a lower figure than 25% may represent a significant loss of earnings. The practice directive indicates that a 10% difference in the pre and post-injury earnings may represent a significant loss in some circumstances.

It is important to keep in mind that the workers' average earnings are already discounted by 10% based on the 90% of net calculation. In addition, the Board includes the amount the award of the section 23(1) assessment in the calculation of the post- injury earnings. The inclusion of CPP benefits and the general age 65 retirement date also impacts the worker's entitlement. Permanently disabled workers are further disadvantaged by their reduced capacity to compete in the general labour market. They face the uncertainties of fluctuations in the economy that leave disabled workers more vulnerable to unemployment than workers without a disability.

To provide a greater degree of consistency in the application of sections 23(3.1) and (3.2) and a more worker-centred recognition of the significant impact of the permanent disability on the worker's future earning capacity:

25. **I recommend that the Board of Directors consider amending policy #40.00 to recognize that a "significant loss of earnings" exists where the difference between the worker's pre-injury earnings against the combined total of the post injury earnings and the amount of the section 23(1) award is at least 10% and also to recognize that a significant loss of earnings does not exists when the calculated result is 5% or lower and further, where the evidence shows that worker's individual circumstances indicate that a loss between 5% and 10% is significant for that worker the Board may determine the worker's entitlement under section 23(3).**

Finally, there is no compelling reason why the determination on the so exceptional test (under section 23(3.1) and (3.2)) cannot be made at the same time as the decision on the loss of earnings decision (under section 23(3)). This would remove the confusion often arising from the separate two-step process. Further, it is important to have the adjudications in the two inter-related decisions made on a consistent basis, for the reasons set out by the court, unless there is compelling evidence to the contrary.

In order to streamline and rationalize the Board's consideration of possible loss of earnings entitlement under section 23 of the Act and to make the assessment process more worker-centred:

26. **I recommend that the Board of Directors consider amending policy to indicate where the Board determines that the worker satisfies the requirements of sections 23(3.1) - that the worker's disability is "so exceptional" - the Board will make a determination in the same decision regarding the worker's entitlement to a loss of earnings pension under section 23(3) and use the same findings of fact as the basis for both decisions.**

Chronic Pain

There are no sections of the Act specific to chronic pain: the condition is adjudicated under policies #22.00 and #39.02. Policy #39.02 defines permanent chronic pain as pain which persists longer than six months and is either disproportionate to the injury or is non-specific. Under this policy, chronic pain is rated as a non-scheduled award at 2.5% impairment.

This policy states:

> Entitlement to a section 23(1) award for chronic pain may only be considered after all appropriate medical treatment and rehabilitation interventions have been concluded.

Policy #22.00 provides that, in "all" cases of (temporary) chronic pain (i.e. after six months), a multidisciplinary assessment must be undertaken. The purpose of this assessment is to assess causation and to provide an opinion on treatment. However, the policy also states that where chronic pain is considered to be "permanent" (i.e. after six months), it may be considered for disability benefits under section 23 of Act.

Policy #39.02 (for permanent chronic pain) also indicates that where the claim has been referred for a permanent disability assessment, the Board may arrange a multidisciplinary assessment to consider the worker's history, health status, the impact of the pain on physical functioning, psychological state, behaviour, ability to perform the pre-injury occupation and the activities of daily living to be used for determining acceptance of the claim.

Neither policy indicates that all necessary medical treatment and supports be identified before the assessment of the permanent disability evaluation is carried out. Rather, the definition of both temporary and permanent chronic pain as being "pain after six months" means that at the point that chronic pain is diagnosed, it may also be considered to be permanent.

There are many emerging treatment options that can assist the worker in coping with chronic pain. It is in the interest of the worker, employer and the Board to ensure that the worker has achieved maximal medical improvement for the chronic pain condition before the permanent disability assessment is carried out. This approach will maximize

the chances of a successful return to work once the recommended and appropriate treatment has been carried out.

27. **I therefore recommend that the Board of Directors consider an addendum to policies #22.00 and #39.02 to ensure that all necessary treatment to maximize the worker's ability to return to safe productive and durable employment has been carried out, before the worker is referred for a permanent disability assessment for chronic pain.**

In the course of my consultations I heard a wide range of concerns about how the 2.5% flat rating for all chronic pain conditions has failed to recognize the impact of this sometimes debilitating condition on workers. This "one size fits all" policy was raised time and again to illustrate the failure to recognize the merits and justice of the individual worker's case where significant chronic pain is identified by the treating health professionals. I was urged to recommend adoption of the Ontario model which compensates some chronic pain related diagnoses up to 90%. Others urged me to consider implementing the recommendation in the 2002 Core Review to provide a range of 0 - 20% for chronic pain.

The Board's Policy, Regulation and Research Division (PRRD) recently initiated a review of chronic pain policies and has embarked on an extensive pre-consultation process with stakeholders. A significant amount of information about the Board's policies and practices has been provided through this process. It is evident that the medical understanding and treatment of pain and chronic pain conditions have evolved significantly in the past 15 years. The PRRD is planning to include involvement of an expert panel as well as the stakeholders in its consultation process.

The Board is to be commended on its initiative to undertake a full review of this important issue. However, the PRRD review process is expected to take some time and the issue I must consider is whether there are some steps the Board of Directors can consider taking on an interim basis to provide a greater degree of fairness to the evaluation of chronic pain, particularly for the more serious cases.

The approach offered by Alan Winter in the Core Review has some merit. It utilized four categories for assessing permanent chronic pain:

- Mild 0-5%;
- Moderate 10%;

- Moderately Severe 15%; and
- Severe 20%.

This approach could be useful in distinguishing varying levels of disability from a chronic pain condition where a distinction is made between impairment and disability using a "biopsychosocial" model.[18] The approach advocated by some uses "activity limitation" as a basis for assessment rather than strict impairment.

I gave serious consideration to recommending this approach to the Board of Directors as an interim policy while the PRRD carries out the chronic pain policy review. The experience from such an interim policy could provide useful data and valuable information for the application of a more flexible approach that considers the experience of the worker.

In the end, however, I decided this option was not practicable. While it could provide a greater degree of fairness for individual workers who experience chronic pain going forward, its development and implementation would take time and it could take resources and focus away from the PRRD review while it was being implemented. The period following its full implementation would be limited.

The other issue arising under policy 39.02 that merits some consideration is the impact of the accepted chronic pain condition on the worker's ability to continue in the pre-injury occupation or to adapt to another suitable occupation. Typically, a low PFI (such as 2.5%) does not indicate a serious impact on employability. However, in the case of chronic pain, the single flat rate of 2.5% does not always reflect the impact it can have on the worker's employability, particularly for the more severe cases.

One way to address this inequity as an interim measure, particularly for the most serious chronic pain conditions, is to make provision in policy to allow for a loss of earnings assessment where the chronic pain condition meets the so exceptional test in sections 23(3.1 and 3.2) of the Act. No new program needs to be developed and no significant increase in Board resources would be required for this. This issue can be further addressed by the PRRD review and the experience from this addition can provide useful evidence when the PRRD considers this issue.

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[18] "Assessing Pain and Disability in the Pain Patient"; Feinberg,S.; Brigham, C.; Ensalada, TL.. In AMA Guides Newsletter, Jan./Feb. 2016 (available online at: http://www.coa.org/2016/presentations/qme/HenryAMAGuides.pdf)

28. I recommend that the Board of Directors consider including a reference in policy 39.02 to indicate that in more serious chronic pain cases where it is established that the disability resulting the chronic pain condition is so exceptional that the section 23(1) award does not appropriately compensate the worker, the Board may consider the claim under section 23(3) of the Act.

Duration of Permanent Disability Pensions

Section 23.1 of the Act makes provision for the payment of compensation for permanent disability entitlement under section 23.1 up to age 65 unless the Board is satisfied that the worker would retire at a later date. Section 23.1 specifically provides:

> Compensation payable under section 22(1), 23(1) or (3), 29(1) or 30(1) may be paid to a worker, only
>
> (a) if the worker is less than 63 years of age on the date of the injury, until the later of the following:
> (i) the date the worker reaches 65 years of age;
> (ii) if the Board is satisfied the worker would retire after reaching 65 years of age, the date the worker would retire, as determined by the Board, and
>
> (b) if the worker is 63 years of age or older on the date of the injury, until the later of the following:
> (i) 2 years after the date of the injury;
> (ii) if the Board is satisfied that the worker would retire after the date referred to in subparagraph (i), the date the worker would retire, as determined by the Board.

The Act does not provide any specific direction on how best to project the date when the worker would likely retire. That matter is left to the Board to determine through Policy. Policy #41.00 states:

> Where the Board is satisfied a worker would retire after reaching 65 years of age, section 23.1 permits the Board to continue to pay benefits to the age the

> worker would retire after the age of 65 **if the worker had not been injured**.
> (emphasis added)

The policy goes on to specify:

> When determining whether a worker would retire after age 65, the circumstances under consideration are those of the individual worker as they existed **at the time of injury.** (emphasis added)

The policy also requires evidence that is verified by an independent source to confirm the worker would work past age 65.

A search of WCAT decisions for "age 65 and 23.1" shows over 1,000 appellate decisions on this issue. There are also ten noteworthy decisions attempting to provide adjudicative guidance to appellate decision makers who have to wrestle with these sometimes difficult cases. WCAT noteworthy decision 2014-03091 provides a comprehensive summary of the legislative background informing section 23.1 of the Act and policy item #41.00 and is helpful in understanding the complexity of this issue and its application.

Policy #41.00 clearly limits the evidence which the Board may consider in a decision under Section 23.1. The policy does not provide clear rationale for these limitations.

I am particularly concerned about the policy requirement to limit consideration to evidence involving the circumstances of the individual worker **as they existed at the time of injury**. This by definition precludes consideration of the possible impact of the injury and resulting permanent disability on the worker's retirement options.

In my view the application of section 23.1 should be considered through the lens of section 23 as a whole and the overall purpose of the Act. The purpose of section 23 of the Act is to estimate **the impairment of earning capacity from the nature and degree of the injury** and provide compensation for 90% of the estimated loss of average net earnings resulting from **the impairment.** The impact of the injury and the resulting disability on earning capacity is at the heart of section 23 of the Act. It is difficult to see how the impact of the injury on the worker's retirement age is not a relevant consideration in determining the worker's date of retirement.

Further, this policy limitation disadvantages younger workers, who are less likely to have made clear retirement plans at the time of injury. A young, injured worker who has lost a limb for life, may well feel aggrieved when he or she receives the decision that the compensation for that injury will be terminated at age 65 while they must endure the impact of that impairment for life. Few young workers will have established verified evidence that they would have retired past age 65. Many will be living from pay check to pay check and may be entertaining dreams of retiring at age 55. For a young worker with a family and a mortgage, the chances of paying off the mortgage by age 65 may not be possible **as a direct result of the injury**.

29. **I therefore recommend that the Board of Directors consider amending policy # 41.00 to allow consideration of all relevant evidence regarding the actual impact of the injury on the worker's likely retirement date, including relevant evidence after the date of injury.**

One additional issue relating to retirement date merits comment. When the Board officer refers the issue to the Disability Awards Department, the evidence of the likely retirement date, particularly if the impact of the injury and resulting disablement is taken into account, is at best thin.

Because this issue is often of considerable important to the worker, who is facing a lifetime of disability, there is a tendency to almost automatically appeal these decisions and to make efforts to gather additional evidence. This is understandable in these circumstances. Failure to do so within 75 days means that decision is final and binding and not open to further review.

However, from a worker's perspective, the Board's decision on the retirement issue comes at a critical time when the worker is often involved in the vocational rehabilitation process and sometimes in the process of consideration of possible entitlement to a loss of earnings pension under section 23(3). The intrusion of an appeal at this stage when the worker is involved in vocational rehabilitation assistance does not assist the rehabilitation process. An appeal at this important time in the claim and in the worker's life can add to and often compound the frustrations that navigating the workers' compensation system can involve. It can have a significant non-therapeutic impact, especially when the appeal is opposed adding the further element of the adversarial process into the mix.

It would be more appropriate in my view to determine the likely retirement date as a preliminary determination under policy #96.21 at the time of the section 23(1) of the Act with a commitment to review that determination two years after all outstanding decisions relating to permanent disability entitlement are made. That will allow the worker an opportunity to provide all necessary information and sufficient evidence for the Board to make a final decision on this issue with confidence. The worker's long-term employment prospects and the impact of the injury on those prospects will be more available and more reliable at that point. This approach will require some added provision in policy #96.21 or a new related policy in #41.00 to provide the basis for a preliminary determination.

30. **I therefore recommend that the Board of Directors consider amending applicable policies to provide for a preliminary determination to be on the issue of the worker's likely retirement age under section 23.1 of the Act with a review of that determination two years after all outstanding decisions relating to permanent disability entitlement have been made.**

Payment of Interest

The issue of interest arose on a regular basis during the course of my consultations mainly from representatives from the worker community. They noted some delay in routine decisions, and frequent significant delays in implementing appellate decisions. One representative documented a 9-year delay in implementing a worker's pension entitlement for a chronic pain condition accepted under her claim and said, "She was denied interest on her delayed payment while the Board earned interest on her money in their investment portfolio." Another submission noted a worker who had to pay interest on borrowed funds to meet his financial obligations while the Board collected interest on his unpaid benefits.

The Workers' Advisers Office provided a detailed submission on this issue. They contend that under current policy, every time a benefit should be paid to a worker but is for one reason or another delayed for a significant period of time, the worker is essentially forced to make an unpaid loan to the Board. He or she may be forced into expensive borrowing while the Board has use of these funds. When the delayed benefit eventually is paid there is no adjustment for the effect of inflation, borrowing costs, or lost opportunity. They submit that payment of interest encourages prompt, complete and accurate decision-making.

The Act currently provides for the payment interest:

- Where survivor's benefits under section 19(2)(c) were incorrectly terminated; and

- Where payments resulting from Review Division decisions are deferred under section 258 pending an appeal to the WCAT.

Prior to November 1, 2001, policy #50.00 provided that the Board also paid interest to workers where:

- the wage-loss or pension was for a condition which was previously overlooked, or for which the Board had previously decided that no payment was due; and

- the effective date for payment of the restored benefits was more than one year prior to the date on which the retroactive benefits were processed.

The interest period was not capped, and interest was compounded and paid at a rate equal to the average return on the Board's investment portfolio for the preceding year, updated annually.

In 2001, the interest policy was changed to adopt the blatant Board error test that provided interest payments only where a Board officer made an "obvious and overriding" error. The issue of interest was considered by the courts in several cases without a clear resolution[19].

In 2012 the WCAT chair issued a decision under section 251 of the *Act* that the blatant Board error test was so patently unreasonable that it was not capable of being supported by the *Act.* The chair also found that the Board of Directors has the authority under section 82 of the Act to make policies for payment of interest in circumstances beyond those prescribed by the Act. The Board of Directors affirmed their policy as viable under the Act and directed the WCAT to apply the policy. Following further consultation[20] with the stakeholder communities, the Board of Directors removed any further provision to

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[19] for example *Johnson v. WCB* 2007 BCSC 1410 ; *Johnson v. British Columbia (Workers' Compensation Board*), 2011 BCCA 255; *Lockyer-Kash v. WCB* 2016 BCSC 2435

[20] "Interest on Compensation" August 2012. A Board discussion paper for consultation with stakeholders.

pay interest on compensation claims other that the two provisions specified under the Act.

As pointed out by the Supreme Court of Canada in *Pasiechnyk,* [21] the four fundamental principles of the Workers Compensation Legislation are:

(a) compensation paid to injured workers without regard to fault;
(b) injured workers should enjoy security of payment;
(c) administration of the compensation schemes and adjudication of claims handled by an independent commission, and
(d) compensation to injured workers provided quickly without court proceedings.

Policy considerations on the payment of interest

(1) Security of payment and timely payment of compensation are foundational to the workers' compensation system.

(2) Payment of interest restores some of the "lost opportunity" from delayed payment.

(3) Payment of interest provides a "quality function" by providing a financial account-ability for delayed payments.

(4) Payment of interest encourages correct decisions in the first instance rather than through appeals.

(5) The confidence in the workers' compensation system is eroded when the Board fails to meet its financial obligations in a timely manner.

(6) There is an onus on the worker to file a claim on a timely basis and to file a re-quest for review or appeal within statutory time limits. There is no such statutory obligation on the Board to make timely decisions.

There are therefore some compelling reasons to consider the payment of interest when there has been a significant delay in the payment of due compensation.

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[21] *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)* [1997] 2 SCR 890

It addition to the foregoing reasons, there is an equity issue with respect to the payment of interest. Where entitlement to a payment is due but not paid, the board retains control of those funds and they are included in the Board's investment portfolio and the Board realizes a return on that investment at a higher rate than what the Board would pay on "simple interest"[22] which is the current method used where the Board now pays interest. When the Board pays no interest on delayed payments it receives a "benefit" in the form of the amount returned on investment for those funds.

The accident fund therefore retains those funds where the Board does not pay interest. Even where the Board does pay interest on delayed payments, the Board still gains the difference on amount earned through the Board's investment portfolio and the amount the Board pays in simple interest. An equitable approach to this issue in my view is for the Board to consider applying some of these accrued funds on investment to the payment of interest.

There are many policy options for the payment of interest on compensation and the payment of interest also involves administrative issues. The policy options are complex as illustrated by the wide variety of interest policies in the jurisdictions where interest is paid. It is beyond the scope of this time- limited review to craft a specific policy option for consideration by the Board of Directors. That requires administrative and actuarial considerations following carful investigation and analysis.

However, an equitable worker-centred approach to the payment of compensation merits consideration of an interest policy that is fair to workers and equitable to employers.

31. **I recommend that the Board of Directors initiate a review if the issue of interest with a view to establishing an equitable interest policy that recognizes the losses experienced by injured workers as a result of delays in the payment of due compensation where the delay is within the control of the Board or results from decisions that are overturned on review or appeal.**

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[22] Simple interest is calculated based only on the principal, while compound interest is calculated based on both the principal and previous interest accrued.

OCCUPATIONAL DISEASES

Evidence and decision making

Policy #97.00 provides adjudicative direction and guidance for investigating claims and weighing evidence in the decision-making process. While this policy also applies to occupational diseases, its focus is primarily on investigation and adjudication of injury claims. Policy #26.23 provides adjudicative direction and guidance for investigating occupational disease claims. These claims are often more complex from an evidentiary perspective around exposure issues and the determination of a diagnosis.

Some recent court cases have offered judicial guidance for occupational diseases. For example, the Supreme Court of Canada in *British Columbia (WCAT) v. Fraser Health Authority* 2016 SCC 25 ("Fraser Health") found that the Board has a jurisdiction to decide causation by making inferences from the evidence, even though scientific proof is lacking.[23] This is consistent with the guidance in *Snell v. Farrell* [1990] 2 SCR 311.

The Supreme Court of B.C. in *McKnight v. Workers' Compensation Appeal Tribunal* 2012 BCSC 1820 found that "diagnosis" is a finding of fact and the adjudicator must apply a legal standard, not a medical standard, for a finding regarding a diagnosis. Under the Act, the legal standard is "as likely as not" under section 99(3), which may be different than a medical standard.

Policy #26.23 could be strengthened by incorporating these same principles.

32. I recommend that the Board of Directors consider incorporating the principles regarding the onus of proof and medical evidence arising from recent judicial decisions into policy #26.23.

Date of Disablement

Section 6 of the Act provides that compensation for an occupational disease is only payable if a worker is "disabled from earning full wages at the work at which the worker was employed".

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[23] The relevant quote from the judgement: *"The law in Canada requires a broad approach to the evidence, which, together with a pragmatic, common sense consideration of the evidence, enables inferences of causation to be drawn even though scientific proof is lacking."*

Policy #26.30 "Disabled from Earning Full Wages at Work" lists some examples of what constitutes disabled from earning full wages at work, including missing part of a shift or not working full hours. Currently, the policy lists "the need to change **jobs** due to the disabled effects of the employment". Equating the provision in the Act - disabled from earning full wages at the work at which the worker was employed" with "disabled from earning full wages at work" has resulted in some ambiguity in adjudicating this issue.

In one case, a pulp mill worker had a sulfur dioxide exposure at work and developed permanent reactive airways disorder. The employer accommodated him so other than attending the emergency room and some medical appointments, he never missed work due to his disability. The Board found that although his injury was compensable, there was no referral to Disability Awards for his significant permanent impairment because he was not disabled from earning full wages, under policy #26.30.

The Board interprets section 6 to indicate that where a worker accepts light duties or modified pre-injury duties they are not disabled from earning full wages at work. Yet the worker is disabled "from the work at which he was employed", otherwise modified duties would not be required.

This ambiguity can be resolved by simply indicating in policy #26.30 the need to change **job duties** at the work at which the worker was employed is sufficient to comply with section 6(1) for compensation purposes. This would ensure that workers who take alternate duties to avoid missing time at work will not be penalized.

33. I recommend that the Board of Directors consider amending policy #26.30 to recognize that the worker is disabled for purposes of paying compensation where the occupational disease disables the worker from performing his or her regular job "duties."

A related problem arises on time limits for making an application in policy #32.55 "Time Limits and Delays in Applying for Compensation." That policy now indicates that the one-year deadline for filing an occupational disease claim starts running from the date of disablement. WCAT cases have confirmed that the "date of disablement" must be treated as the date of the occurrence of the injury for section 55 purposes (*WCAT #2005-03633* - Noteworthy Decision re Red Cedar Dust Asthma). There is no "date of disablement" for s. 55 purposes if the worker has not taken time off work (*WCAT-#2014-01931* Noteworthy Decision).

This can be resolved by recognizing in policy #32.55 the same principle for time limits for injuries under section 5 of the Act in policy #93.22. That policy recognizes special circumstances in a situation where a worker with a minor physical injury was not disabled from work and did not require medical treatment. The Board of Directors may also wish to consider a minor policy amendment in policy #32.55 to address that issue.

Activity Related Soft Tissue Disorder (ASTD) claims

I received many submissions regarding ASTD claims. The Board receives a high volume of these claims. They often make their way into the appeal process. Policy #27.00 - #27.32 provides detailed adjudicative direction and guidance for these claims for specific conditions. The first step in the adjudication process is to determine whether the claim is to be adjudicated under section 5 of the act as a personal injury or under section 6 as an occupational disease. Diagnosed conditions recognized through regulation or listed in schedule B are normally adjudicated under section 6 unless the condition arises from a specific incident or trauma, a series of trauma or the onset occurs during a specific shift.

Policy #27.00 2. addresses in general terms the distinction between an ASTD claim that is considered an occupational disease and one that is considered a personal injury. Often the diagnosis of an ASTD condition is unclear at the outset of the claim and it is difficult to determine which section of the Act should be used for adjudication. In the past, the ASTD *Practice Directive* provided guidance on what section of the Act (section 5 or section 6) to apply for different conditions and circumstances and stated that where there was a "working diagnosis only", an ASTD should be adjudicated under both section 5 and section 6. The current *Practice Directive* does not contain this provision nor does the ASTD policy.

This means that simple diagnostic issues - unclear or conflicting or delayed or multiple diagnoses, which are not uncommon for ASTDs - can lead to ASTD claims being adjudicated under the wrong section, under the wrong policy and having the wrong causation tests applied at the Board and on appeal. If the worker must seek additional decisions under the other section of the Act, there will be a significant delay in compensation benefits and a fragmentation of the Board's adjudication, often causing problems of jurisdiction on appeal. A clear statement in policy #27.00 to indicate that, where there is some evidence that the ASTD could be considered under either section 5 or section 6,

both issues be adjudicated at the same time to avoid unnecessary appeals and resulting delays.

34. I recommend that the Board of Directors consider an amendment to policy #27.00 2. to indicate that, where there is no clear diagnosis and there is some evidence that the ASTD could be considered under either section 5 of section 6, the decision include consideration of the claim under both sections.

ASTD adjudication policies provide specific direction regarding risk assessment for these conditions. *Practice Directive* C4-2 which is not Board policy, is relied on extensively to adjudicate ASTD claims. Labour representatives contend that the guidelines in *Practice Directive* C4-2 are outdated and rely primarily on research that is over 20 years old. They argue that, "The numbers are mostly derived from individual studies cited in the NIOSH 1997 Systematic Literature Review *Musculoskeletal Disorders and Workplace Factors - A Critical Review of Epidemiologic Evidence for Work-Related Musculoskeletal Disorders of the Neck, Upper Extremity, and Low Back.* "

I was referred to *WCAT-2011-02371* that provides a detailed analysis that documents the limitations of P*ractice Directive* C4-2 in adjudicating ASTD claims. That directive contains "pre-conditions" that preclude the exercise of discretionary decision-making as set out by policy. Many of the numeric values establish standards which are equal to or higher than the risk factor thresholds set out in Schedule B. The Vice-Chair noted that the "one-size-fits all" prescriptive approach set out in Appendix 1 of the *Practice Directive* essentially defeats the purpose of the legislation and binding policy, which both provide for flexibility to consider the particular circumstances of the case and the exercise of judgement consistent with section 99 of the Act.

The impact of lack of discretion exercised by decision-makers can be seen in the judicial review of *WCAT-2013-03319* in *Rutter v. WCAT 2015 BCSC 862.* In this case the court found that WCAT had narrowed the work-related risk assessment to one of "repetition" and imposed a higher standard of causation for this single factor than provided for by policy. More importantly, the court found that WCAT was patently unreasonable when it virtually ignored the worker's right shoulder disability as a "risk factor" for developing a left shoulder ASTD. The court stated that although favouring one's shoulder is not expressly identified as a risk factor in Board policy, it was required by the general language of policy #27.00 and section 250(2) of the Act and was "clearly called out for" in the circumstances of the case.

In light of the high number of appeals arising out of the application of *Practice Directive* C4-2 and the court's judgement on the importance of affirming consideration of all of the relevant circumstances:

35. I recommend that the Board of Directors consider an amendment to policy #27.00 further emphasizing the importance of identifying all of the relevant risk factors that exist in the particular case and base the decision on a careful evaluation of the evidence in accordance with Board policy and taking into consideration the merits and justice of the individual case.

Worker representatives also submit that the Board's *Occupational Health and Safety Regulation* (Regulation) and published guidelines provide more up-to-date guidance addressing risk factors for preventing musculoskeletal injuries and these factors should be incorporated into the *Practice Directive* to guide adjudication of these conditions. Sections 4.46-4.53 of the Regulation address "Ergonomic (MSI) Requirements" where "MSI" means a "*musculoskeletal injury*" or injury or disorder of the muscles, tendons, ligaments, joints, nerves, blood vessels or related soft tissue including a sprain, strain and inflammation that may be caused or aggravated by work.

The guidelines for this section of the Regulation set out how to assess risks using MSI Risk Factor Identification Worksheet A and MSI Risk Factor Identification Worksheet B. This data may be relevant to the adjudication of claims in some cases.

36. To ensure that relevant risk factors in the workplace are fully considered in the adjudication of ASTD claims, I recommend that the Board of Directors consider an amendment to policy #27.00 5. that the use of relevant risk analysis data from the workplace be considered in the adjudication of these claims.

With the changing nature of work and the integration of computers in the workplace, many of the issues arise from ASTD claims from workers with intense typing, keyboarding and mousing tasks. These claims are often denied on the basis that the single risk factor of repetition cannot result in an ASTD type injury. Yet this is not consistent with the Board's approach to ergonomic issues for computer use, under the Regulation and guidelines.

37. I recommend that the Board of Directors consider developing an ASTD policy specific to the risk factors consistent with the ergonomic requirements in the Regulation and guidelines.

One union that represents diagnostic imaging workers advise they have assisted 29 members appeal ASTD decisions based on the C4-2 guidelines. They point out that of the 29 members, appeals were allowed in 26 of the cases with additional evidence from a professionally-trained ergonomist. They argue that many of the ASTD appeals now clogging the appeal system could be avoided if the Board carried out standardized ergonomic assessments using more up-to-date environmental risk factors. It is apparent from the evidence presented that professional ergonomic assessment is the best available evidence to resolve the ASTD issue. It would be more effective from a worker-centred approach for the Board to apply this ergonomic expertise at the first level of decision-making to get it right without the negative impact involved in forcing the worker into the appeal system.

38. I recommend that the Board of Directors consider what steps are necessary to ensure that there is adequate expertise at the Board level to fairly and efficiently adjudicate ASTD claims without resorting to review and appeal levels wherever possible.

The union also argued that their record of successful appeals supports consideration of an industry presumption under schedule B for diagnostic medical imaging technologists. I make no recommendation on this, since it is beyond the scope of my terms of reference. Prior to 2002, the Board had an Occupational Disease Standing Committee with a mandate to review the Board's occupational disease policies and make recommendations for changes and additions to the Board. That Committee provided the Board with a mechanism to determine whether there was a basis to recognize a probable relationship between a disease and an occupational activity and make recommendations about additions to Schedule B.

MENTAL DISORDERS

Policy C3-13.00 sets out decision-making principles for determining a worker's entitlement to compensation for a mental stress injury, under section 5.1 of the Act. In consultations, it became clear that the majority of mental disorder claims arose from occupations that involve work related traumatic events and stressors, such as first responders. It also appears to be the case that the majority of these claims are not accepted.

There is no doubt that section 5.1 imposes special restrictions on mental disorder claims, compared to other types of injuries. However, in a worker-centred compensation system, Board policy should not raise the bar to compensation higher than the legislation provides. In my view, policy C3-13.00 creates further barriers to compensation for work-related injuries in this area in two main ways.

First, the policy guides a decision-maker to seek a definition of "traumatic events" and "significant stressors" using workplace norms as an objective standard. The policy defines "traumatic events" as being an emotionally shocking event "which is generally unusual and distinct from the duties and interpersonal relations of a worker's employment" and a significant "work-related stressor" as one which is excessive compared to the "normal pressures or tensions". This policy guidance strongly indicates that traumatic events or stressors which are NOT unusual do not qualify under this provision, excluding the very type of event which is likely to be involved in a mental stress injury for these occupations.

In effect, these policy provisions import an element of an old "assumption of risk" doctrine in that the "normal" or "usual" job duties are objectively non-compensable (the worker assumes the risk) and only "unusual" events are compensable. Normal work is effectively exempted from compensation for mental stress. This barrier is not required or sanctioned by the legislation. At the same time, it is clear that the legislation did not want to endorse a "causative significance" test for these type of injuries.

It would be helpful if policy permitted both a subjective and objective element to the definition of "traumatic event" and "significant stressors", by removing the provisions requiring that the events or stressors be "unusual" or outside the "normal" and instead, offering another standard. A "traumatic" event could be one which in all the circumstances was reasonably likely to have traumatized the worker.

39. I recommend that the Board of Directors consider amending the definitions of "traumatic event" and "significant work-related stressor" to remove the requirement that events or stressors be "unusual" and to include a subjective element to the definitions.

Secondly, the policy offers little guidance, other than what is in section 5.1(1)(c) the Act, for situations which will be excluded from consideration, what is known as the "labour relations exclusion".

It would be helpful if the policy clarified that this provision only excludes mental disorders that are a direct reaction to the employer decision itself. Everything a worker does in a workplace is ultimately decided at some level by the employer and if read too broadly, this policy could exclude some claims not intended by the legislation. The provision of examples would be particularly helpful. For example, if a worker hears that several co-workers are being laid off, his or her reaction to the employer's decision is not compensable, however traumatic, due to this provision. However, if a worker is forced to work long hours in stressful conditions due to her employer's downsizing, a resulting mental disorder that is due to the impact of these negative working conditions should not be excluded from consideration on the basis of the "labour relations exclusion" without consideration of all the relevant facts.

40. I recommend that the Board of Directors consider amending policy C3-13.00 clarify that application of section 5.1(1)(c) of the Act, the "labour relations exclusion" is to be applied to reactions to the employers' actual decisions, not workplace conditions as a whole.

The final issue to consider is the sensitivity and compassion that these claims require. Appendix 3 contains a brief case summary where the worker's interaction with the Board was problematic and from the worker's perspective clouded with suspicion. The nature of these conditions requires special sensitivity to not worsen the condition. The Board's Department of Special Care Services provides support for psychologically fragile workers when those cases are referred to them, but this is not always the case before cases are referred to them.

This is particularly problematic where there is some doubt on the Board's part about the validity of the claim. I heard several concerns expressed regarding the use of video surveillance to investigate some cases involving psychologically fragile workers.

Video Surveillance

Currently, there is no policy governing the Board's use of video surveillance to gather evidence on injured workers. The *Practice Directive* #C 12- 7 provides some guidance but is not binding.

This is a difficult subject. Ideally, video surveillance should be the "tool of last resort", used only when there are "reasonable grounds" to suspect misrepresentation or fraud on the part of the worker and safeguards for using this tool should be carefully adhered to, especially for psychologically fragile workers. This was not the information I received in my consultations.

I believe that video surveillance is an area where there needs to be substantial changes in Board practice, informed by clear Board policy. In effect, video surveillance should be a tool used to determine if a worker has engaged in serious misconduct. It should be used with clear procedural guidelines and protections and should not be used as a simple adjudicative tool for difficult files. There is also a disturbing pattern of claims which are denied or terminated on the basis of video surveillance, but which, on appeal, are found to not be substantiated by the video surveillance.

Important principles for a new policy on video surveillance could include:

- A request procedure which requires:
  - clear and substantive reasoning and is not just a subjective opinion from a claim owner; and
  - Approval by a person independent of the claims adjudication process, based on clear criteria. This is the path used for Prevention investigations.

- Guidelines that video surveillance is a tool of last resort. Where there is a concern about the consistency of a worker's presentation, claim owners should attempt to attain additional assessments or evidence prior to a request for surveillance.

- A requirement that when the video surveillance is obtained, it is examined for its probative value by a qualified examiner. *WCAT-2003-03300* provides helpful key questions for the assessment of video surveillance.

- That if there is a consideration of adverse decisions after the surveillance is completed and examined, that the worker or his representative will be provided with the surveillance evidence and given a reasonable time to respond.

- If criminal charges are contemplated, then the procedural protections afforded by the Charter in a criminal context apply. In the context of an investigation, these are set out in *R. V. Jarvis* [2002] 3 S.C.R.

41. **I recommend that the Board of Directors consider implementing a policy for the appropriate use of video surveillance to meet Board responsibilities without causing unintended harm to the worker.**

CONCLUSION

At the heart of workers' compensation in British Columbia is the need to share a joined commitment on the part of workers and employers to maintain a fair and equitable workers' compensation system. The sustainability of the system depends on maintaining a balance of interests between these primary stakeholders consistent with the principles of the historic compromise. Failure to maintain this balance can undermine the integrity of the system and invite its demise.

As Mr. Justice Tysoe pointed out in his 1966 Royal Commission Report, the overriding purpose of the system is to protect workers from injury and disease by maintaining safe and healthy workplaces. Where workplace injury and/or disease occurs, the system must support the worker's maximum recovery and restore the worker to safe and productive employment at no loss of earnings wherever possible and equitable compensation where that goal is not achieved.

Employers carry the responsibility of maintaining sufficient funding of the system to ensure that injured and disabled workers receive the necessary supports to achieve maximum recovery, return to safe, productive and durable employment, and adequate compensation benefits to replace the financial losses they suffer as a result of the injury.

Workers bear the heavier burden of dealing with the pain and suffering resulting from the injury, the disruption to their lives and livelihood, and the financial stresses that often accentuate the resulting disablement. To be equitable, the funding from employers must be sufficient to provide the necessary supports and services to fully restore injured workers to their pre-injury employment status and provide compensation benefits needed to replace their losses.

The 2002 changes to the Act were based on a fear largely on the part of employers and the new government that the existing benefit levels were unsustainable based on a predicted unfunded liability. That projected unfunded liability was based on assumptions rooted in the experience from the economic downturn in 2000-2002 and never materialized. As previously noted the Board ended up with a surplus of $571 million in 2002.[24]

Since, 2002, employers have received a 15% reduction in average assessment rates while workers benefits have been frozen at the reduced levels introduced in 2002. In 2015 the Board reported a surplus of $927 million and in 2016 a surplus of $471 Million.

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[24] H. Allan Hunt, Service Delivery Core Review: A Reappraisal, 2010, Page 14.

This has resulted in a significant imbalance between the adequacy of benefits to workers and the sufficiency of the accident fund for employers. Restoring that balance in benefit levels is mainly a legislative issue and is beyond the scope of this policy review.

My task in this review has been to identify policy options for consideration by the Board of Directors to restore a worker-centred approach.

The first step in restoring this balance in policy is to incorporate the requirement in section 99 of the Act to consider the merits and justice of the individual case when applying a policy of the Board of Directors. This requires adequate investigation of the facts and circumstances of the case with particular attention to the worker's evidence before making a decision. This emphasis must not only be incorporated into the words of policy, it must become an essential part of the Board's case management system. Treating workers with dignity and respect is an integral part of a worker-centred approach and must be a hallmark of the Board's interaction with workers.

The focus of my recommendations in this review is on restoring injured workers to safe, productive and durable employment as soon as the medical evidence indicates that is appropriate in the circumstances of the case. I have also provided policy options that reinforce the key goal of returning injured worker to the injury employer wherever possible. This is not only an emerging legal imperative, it also makes good sense for both the worker who maintains an established attachment to the pre-injury workplace, and of value to the employer who retains a trained and experienced worker.

Perhaps most important, retaining the injured worker with the injury employer minimizes the need to engage in complex and sometimes expensive retraining and re-employment supports to place the injured worker with a new employer. The cost associated with increased vocational rehabilitation benefits in the early stages of the claim to confirm attachment with the injury employer, result in significant savings in the later stages of the claim where placement with a different employer is costly and sometimes results in loss or earnings consideration.

The challenge for a renewed vocational rehabilitation commitment in the early stages of the claim is first the need for additional vocational service delivery capacity and second, and equally important, that the additional staff have the necessary training and experience in disability management to delivery this support efficiently and effectively using established disability management tools and strategies. Ontario has pursued this strategy for six years with considerable success in both restoring workers to productive em-

ployment with their injury employer, but also achieving significant cost savings. They attribute their success in part to their commitment to require and support certified professionalized training for the return-to-work specialists who carry out this work.

A secondary area of focus in my recommendations is to identify policy options to prevent unnecessary appeals. There is a high level of appeal activity around light duty reemployment and around pension and loss of earnings issues. I have recommended policy options to provide a greater worker-centred approach in these areas, with the intent of reducing unnecessary appeals that often delay and sometimes disrupt the return to work efforts. The Board's new "Comprehensive Framework for Quality Decision Making Sec 23(3)" is an example of a proactive approach now being taken by the Board.

I have attempted to address key areas of concern raised by employer and worker stakeholders. However, there are many additional areas that merit attention that I was unable to investigate and fully consider within the nine-week time frame of this review. It is my hope that where there are other issues in which stakeholder representatives and the Board's administration feel that significant improvements can be made, or where my recommendations can be improved, I urge them to bring these to the attention of the director of the Board's Policy Regulation and Research Division for consideration and where appropriate to the Board of Directors.

Based on my experience with this review, I believe the employer and worker stakeholder communities appreciate the need to correct the imbalance that has occurred in the system over the last 15 years and to restore that balance with a worker-centred approach to ensure that the British Columbia workers' compensation system is sustainable over the long term.

ACKNOWLEDGEMENTS

In the course of this review I have had the privilege of meeting with and hearing the ideas, concerns, and recommendations of representatives of the employer and worker communities. On the basis of my consultations I believe there is a willingness to work together to improve the system where it is found lacking. I am greatly indebted to each and every representative that took the time to share their views and their vision of a fair and equitable system.

Alan Winter and Janet Patterson provided some sage advice and guidance as I navigated challenging legal issues. Janet was especially instrumental in providing me with a grounding in the many judicial decisions that provide guidance for the system. I especially appreciate the insights and ideas that Doug Alley from the Employer's Forum and Nina Hansen from the BC Federation of Labour shared. They very ably represented the views of their respective communities.

I also want to express my appreciation to the leadership of the Board's administration who were generous with their time to review some of my proposals and offer valuable advice. I am especially grateful to Trevor Alexander, Senior Vice President of Worker and Employer Services and his leadership team whose guidance was invaluable to me. I believe they have the expertise and commitment to make support the transition to a more worker-centred approach. Lori Guiton, Director of the Board's Policy, Regulation and Research Division was especially helpful in providing background information and analysis.

I was very impressed with the commitment of the Workers Advisers Office and the Employers Advisors Office not only to serve their constituent communities, but to also work toward solutions that benefit the workers compensation system as a whole. I believe they can and will play an important role in promoting and supporting a worker-centred approach that is equitable to workers and employers.

I had an opportunity to meet with each of the members of the Board of Directors and I am impressed with the calibre of the leadership they convey. I am particularly indebted to Lynn Bueckert, the director representative of workers, and Lillian White, the director representative of employers, who serve as co-chairs of the Board of Directors Policy Committee. Together they met with me at critical junctures in this review. While they ably represent their constituent communities, they together demonstrate the commitment to cooperation needed to achieve a balanced system that serves the employers

and workers of British Columbia. I also thank Board chair Ralph McGinn for giving me the opportunity and the privilege of participating in this important project.

Finally, I must thank my good friend and colleague Donna Hanson for her invaluable assistance, patience and support for making it possible for me to compile and deliver this report on time.

Appendix A

Name	Title	Organization
Alexander, Trevor	Senior Vice-President, Operations	WorkSafeBC
Alley, Doug	Managing Director	Employers' Forum
Bains, Hon. Harry	Minister of Labour	Ministry of Labour
Blakely, John	Executive Director	Ministry of Labour, Labour Policy and Legislation Division
Boddez, Angela	Director, Fair Practices Office and Registrar	WorkSafeBC
Buck, Brad	Manager, Safety Advisory Services	BC Public Service Agency
Bueckert, Lynn	Board of Director	WorkSafeBC
Chauhan, Sam	Manager, Occupational Health & Safety	City of Surrey
Corwin, Lucas	Director	Ministry of Labour, Workers' Advisers Office
Cooke, Alan	Board of Director	WorkSafeBC
Dehek, Lani	Manager of OH Disability Management	BCNU
Dhillon, Baltej	Board of Director	WorkSafeBC
DoCouto, Evie	Vice President, Return to Work Division	Workplace Safety & Insurance Board
Earle, David	President & CEO	BC Trucking Association
Farquhar, Alec	Director	WAO, Ontario MOL
Fournier, Kim	Manager, Law and Policy	Ministry of Labour, Employers' Advisers Office
Gravelle, Joyce	Vice-President, Administration	National Institute for Disability Management and Research
Guiton, Lori	Director, Policy, Regulation & Research	WorkSafeBC
Hanna, Janice	Claims Adjudicator, WCB Disability Awards	Retired
Hansen, Nina	Director, Occupational Health and Safety	BC Federation of Labour
Haralds, Dave	Executive Director	Ministry of Labour, Employers' Advisers Office
Harder, Brian	OH&S Representative	United Steelworkers
Harrison, Rolf	Lawyer	Harrison O'Leary Lawyers
Hartmann, Chris	Director, Return to Work Services, Voc Rehab & Disability Awards	WorkSafeBC
Hughes, Trevor	Deputy Minister	Ministry of Labour
Hunt, Stephen	District Director	United Steelworkers District 3 Western Provinces and Territories
Hynes, Susan	Chief Review Officer	WorkSafeBC
Ishkanian, Vahan	Barrister and Solicitor	
Jackson, Alex	Rehabilitation Consultant	
Jobe, Jim	WCB Advocate	Health Sciences Association
Kawa, Leah	EDMP Administrator, Labour Relations Officer	Health Sciences Association
Kilby, Jeannie	President	CUPE 402
Laurie, Michelle	Staff Representative	United Steelworkers
Leyen, Jennifer	Director, Special Care Services	WorkSafeBC
Loftus, Lee	Board of Director	WorkSafeBC

Name	Title	Organization
Love, Kevin	Barrister and Solicitor	Community Legal Assistance Society
Lowes, Larry	Manager, Health and Safety	London Drugs Limited
Luck, Susannah	WCB Case Manager	Morneau Shepell
MacDonald, Iain	Staff Representative	BCGEU
MacDonald, Pamela	Regional Manager	Workers' Advisers Office
McDonald, Todd	Vice-President, Claims Services	WorkSafeBC
McGinn, Ralph	Chair, Board of Directors	WorkSafeBC
McKenna, Tom	National Representative	CUPE
McMillan, Grant	Strategic Adviser	Council of Construction Associations
McNeil, Margaret	Board of Director	WorkSafeBC
Miles, Diana	President & CEO	WorkSafeBC
Morrison, David	Regional Manager	Workers' Advisers Office
Nicholls, Rob	Manager, Safety, Security and Emergency Management	Metro Vancouver
O'Donnell, Merrill	Workers Advocate	BC Building Trades
O'Leary, Sarah	Lawyer	Harrison O'Leary Lawyers
Parhar (MD), Dr. Gurdeep	Executive Association Dean	Clinical Partnerships Faculty of Medicine, UBC
Parker, Jim	WCB Officer	BCNU
Patterson, Brooks	Board of Director	WorkSafeBC
Patterson, Janet	Barrister and Solicitor	
Pendray, Andrew	Chair	Workers Compensation Appeal Tribunal
Picotte, Adam	Barrister & Solicitor - WCB Advocate	Health Sciences Association
Pongracic-Speier, Monique	Lawyer	Ethos Law
Rogers, David	Rehabilitation Consultant	
Rothfels, Dr. Peter	Director, Clinical Services and Chief Medical Officer	WorkSafeBC
Schmidt (PhD), Dr. James	Neuropsychologist	Schmidt Trentadue & Associates
Schnoff, Niki	Staff Representative	Move Up Together
Shaw, Ian	Senior Vice- President & General Counsel	WorkSafeBC
Startup, Mark	President	Retail Council of Canada
Stoffman, Larry	Consultant	United Food and Commercial Workers Union (UFCW) Local 1518
Tanner, Michael	Director	Ministry of Labour, Labour Policy and Legislation Division
Taylor, Alex	Regional Manager	Workers' Advisers Office
Teschke, Kay	Board of Director	WorkSafeBC
Wainwright, Helga	LRO	Health Sciences Association
White, Lillian	Board of Director	WorkSafeBC
Williams, Blake	Past Director	Workers' Advisers Office
Wilson, Greg	Director, Government Relations	Retail Council of Canada
Winter, Alan	Barrister and Solicitor	Harris and Company
Wolfgang Zimmerman	President & CEO	Pacific Coast University for Workplace Health Sciences
Young, David A.	Regional Director, Worker and Employer Services Division	WorkSafeBC

Appendix B

Table 1 Lost time, Duration and Impairment data (source AWCBC KSM 2016)

	total lost time claims	lost time Injury frequenty	Average composite duration of claims	Average impairment rating	% of claims awarded impairment benefits
British Columbia	51,044	2.2	70.90	9.6	11.1%
Alberta	24,380	1.25	65.75		11.22%
Saskatchewan	8,589	2.11	N/A	7.43	6.75%
Manitoba	14272	2.89	77.40	4.86	6.82%
Ontario	57,386		N/A	9.92	5.97%
Quebec	68,537	1.8	N/A	10.27	26.66%
New Brunswick	4,516	1.33	92.3	7.1	14.92%
Nova Scotia	6,087	1.93	110.32	7.93	23.94%
Prince Edward Island	1,010	1.47	74.3	6.28	20.52%
Newfoundland and Labrador	3,589	1.72	117.07	15.18	14.09%
Yukon	464	2.1	30.76	8.56	8.09%
Northwest Territories and Nunavut	826	2.03	49.94	9.4	13.5%

Table 1.2 Compensation Benefits by Province (source AWCBC)

	Maximum comp earnings	% of earnings benefits are based on	Waiting Period	Permanent Disability maximum: PTD	Permanent disability minimum: PTD
British Columbia	$78,600.00	90% of net	no	$4,486.22	$1,691.85
Alberta	$95,300.00	90% of net	no	$5,152.42	$1,428.70
Saskatchewan	$65,130.00	90% of net	no	$4,884.75	$2,124.74
Manitoba	No Maximum	90% of net	no	$5,901.85	$1738.70
Ontario	$85,200.00	85% of net	No	N/A	N/A
Quebec	$70,000.00	90% of net	no	N/A	N/A
New Brunswick	$60,900.00	85% loss of earnings	3/5 of weekly benefits	$3,285.66	no minimum
Nova Scotia	$56,800.00	75% 1st 26 weeks then 85% of net	2/5 weekly benefits	N/A	no minimum
Prince Edward Island	$52,100.00	85% of net	2/5 weekly benefits	lump sum	no minimum
Newfoundland and Labrador	$61,615.00	80% of net	2/5 weekly benefits	$3,121.32 based on 80% net earnings	some minimum rules apply
Yukon					
Northwest Territories and Nunavut	$86,000.00	90% of net	no	$1138.25 northern residents	no minimum

Return-to-Work/Duty to Accommodate

	Obligation to Re-Employ	Legislation	Policy & Procedure	DTA Details	RTW Details
British Columbia	No	N/A	N/A	Employers encouraged to rehire at Phase II	No requirement under WCA for employers to rehire injured workers
Alberta	Yes	S.88.1(1) & (3)	Draft 04-05 Appl. 2-5	Wkr empl 12 months No exemption for small empl.	DTA unless undue hardship
Saskatchewan	Yes	S.51, 5.3 & 101 (1b)(ii)	POL 08/96 POL 01/07	To the point of undue hardship	Obligation of employer to cooperate
Manitoba	Yes	S.49 (3)	Policy 43.20.25	Applies where 25+ workers 12 continuous months	Reinstatement in original job where possible
Ontario	Yes	S.41 – 43 Reg 35/08	19-02-02 Respons. of wkr/empl.	To the point of undue hardship Exception for construction	Obligation to reemploy 20+
Quebec	Yes	S.32 S 234 – 251 S. 176	Policy 3.01 3.02	Commission may reimburse cost of accommodation	Right to reinstatement within 1 year where 20+ workers
New Brunswick	Yes	S.42.1	Policy 21 - 413	Required to re-employ > 10 exempt 10-19 1 year 20 + 2 years	Duty to communicate DTA from human rights – obligation 1 year
Nova Scotia	Yes	S.89 – 101	Policy on re-employment	Empl with less than 20 exempt 1 year empl	To the point of undue hardship
Prince Edward Island	Yes	S.86.1 – 86.12	Policy 93 RTW	20+ workers 1 year Const. exempt	To the point of undue hardship
Newfoundland/ Labrador	Yes	S.89 – 89.4	Policy 33.00 – 43.00	20 + workers 1 year empl.	To the point of undue hardship
Yukon	Yes	S.41 (1)	Policies 04-06 07-1-3 08	20 + workers Empl 1 yr	Mandatory accommodation
Northwest Territories & Nunavut	No	S.46	Policy 04.14	No DTA	VR Services

Appendix C

Firefighter case study - PTSD

(the following case study was provided by a firefighter who agreed to include this in my report)

About 4 years ago, in December sometime in the morning, I went to a call for a sick child. When we arrived, we quickly realized that this child (I believe he was under 18 months) was way sicker than we thought. He wasn't breathing and had no pulse. The scene quickly escalated. The family panicked, and screaming everywhere, I personally picked up the infant and began our cpr protocols in my arms. (the child was on a bed, so we had to transfer to a flat surface). The ambulance arrived shortly after us, and began the airway control and had us continue the cpr. Anyways...long story short, I did CPR on this child all the way to the hospital, with the majority of it occurring in my arms. It was awful. The child didn't make it.

This call happened on our first day shift. I didn't feel like coming to work the next day and called in sick. I called in sick for my night shifts too. (3 sick days) Those 3 days off, I hung out with my friends and family, sought professional help, had a beer or two, and went into the mountains to snowboard and clear my head. It was the perfect rehab for me. When I returned to work, I felt great about things.

Approximately 2-3 months later, [my captain who is responsible for Health and safety] approached me and asked whether I took those days off sick because of that call, and I replied yes. He wanted me to make a claim with WCB. I agreed. I was going to try and claim back my 3 days of sick time.

I'm not sure how it all got started, but I received a call from a WCB case agent. This was an intake person before I was assigned my actual person....This person knew the story from what I had claimed, but phoned to get some information from me, start my claim, inform me of the process, and to ask about the incident. I recounted the incident to her and re-lived all the emotions that came with it. It was awkward to pass this story on to an intake person, but assumed that she'd understand. She took my story, and said she would pass on my claim to a case manager and that I would receive a call within a certain time period..(can't remember how long it was)

Fast forward a couple weeks. [My case manager] gave me a call to introduce himself, explain the process and hear the story. I recounted the story to him, relived the emotions, and now was frustrated that I had to repeat this story again. [He] agreed that "it must have been stressful" and that it certainly warrants a WCB claim. [He] went on to say how as firefighters were expected to "weather a certain amount of expectational stress" (as in, this kind of stress is considered expected for our job, whereas it wouldn't be for other jobs). I had no idea what

else to say to him. I asked a few questions, and then left it at that. He was going to start my claim process and get back to me.

A week or so later [he] calls back. He asked how I was doing, and explained what was going to happen next. But first, he wanted me to talk about the incident again. I wasn't too thrilled on telling the story again, so I left out some of the major details and told him the basics, as he already knew the whole story...right? After the basics were done, [he] wanted to know more about the stuff I left out this time, so he probed, and asked for some more of the details, and basically made me tell him all the story again. I felt at this point that they did not believe me, and that the reason I was telling the story over and over and over was to see if it was the same each time – like they were trying to find a gap in the story or something like that. It stressed me out.

IN order for me to have my claim accepted, I would have to go see one of their doctors for an evaluation. Fine I thought...whatever. ...but then he said "in order for your claim to be accepted, our doctors will have to diagnose you with an accepted mental disorder....like one in the big book of medicine...on the list of mental disorders..." Once I was diagnosed, then my medical records would be passed on to my employer and my claim would be accepted. I didn't like the sound of that. I was really stressed now. I told him that I would call him back, but that I didn't like the sound of that.

I called [my captain] to discuss what he wanted me to do. I had now been dealing with this call for way too long, re-lived it way too many times, and told [my captain] I was more stressed now then I was after the call. I wanted to drop the claim and he agreed.

I called [the case manager] back and told him I was going to drop the case. I told him what I thought about the process and left it at that. I was done.

It was an awful experience mostly because I felt like they didn't believe me at all. It honestly felt like such an uphill battle against someone who has NO IDEA what it is like to do my job...let alone CPR on a child, in front of the family, at Christmas.

WCB at the Crossroads: Experience Rating, Claims Suppression and Collective Liability

An addendum to my 2018 Report "Restoring the Balance:
A worker-centred approach to workers compensation policy"

Introduction

In 2018, I was commissioned by the Minister of Labour and the Workers Compensation Board's governing Board of Directors to carry out a summary review of the WCB compensation claims and rehabilitation policy and to provide recommendations to make that policy more worker-centred. My report, "Restoring the Balance: A worker-centred approach to workers 'compensation policy," made thirty-four recommendations to bring that policy more in line with the needs of injured workers[1].

The WCB Board of Directors implemented many of the policy recommendations including my recommendation that there be an independent research study into the nature and extent of claim suppression in B.C. The Board of Directors commissioned a study by the Institute of Work & Health ("IW&H claim suppression study") which reported their findings in 2020.[2] The IW&H claim suppression study found extensive "under-reporting" of workplace injuries and a significant level of illegal claim suppression.

Compensation research indicates that "experience rating", the prevailing method of funding the compensation system, can provide a financial incentive to discourage employers from reporting workplace injuries[3]. Research also indicates experience rating as a funding method may also stimulate employer behaviours which can adversely impact the physical and mental health of injured workers[4]. In the late 1990's

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[1] Report available on line at: https://www.worksafebc.com/en/resources/about-us/reports/restoring-balance-worker-centered-approach?lang=en

[2] *Estimates of the nature and extent of claim suppression in British Columbia s workers compensation system"; 2020, Institute for work and Health* — "The Claim Suppression Study". https://www.iwh.on.ca/scientific-reports/estimates-of-nature-and-extent-of-claim-suppression-in-british-columbias-workers-compensation-system

[3] Ison, T.G. (1986). The significance of experience rating. Osgood Hall Law Journal, 24, (4) 723-742. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2129183. Also see Ison T.G. (2013). "Reflections on Workers' Compensation and Occupational Health and Safety". 26 C.J.A.L.P. p. 1-22.

[4] Mansfield, L., MacEachen, E., Tompa, E., Kalcevich, C., Endicott, M., & Yeung, N. (2012). A critical review of literature on experience rating in workers compensation systems. *Policy and Practice in Health and Safety, 10*(1), 3-25. Now available online at: https://doi.org/10.1080/14774003.2012.11667766

the WCB Panel of Administrators fully embraced experience rating as BC's funding mechanism for the workers compensation system[5].

In 2022, I provided an addendum to My 2018 report — "Claim Suppression: the elephant in the workplace" — which summarized key findings from the IW&H claim suppression study.[6] In that addendum, I offered 13 recommendation for consideration by the WCB Board of Directors to reduce the incentive to under-report workplace injuries and to illegally suppress compensation claims. These recommendations included measures to better enforce the provisions in the *Workers Compensation Act* (*Act*) that prohibit claim suppression activities.

In the three years since my 2022 addendum, I have gathered WCB data through Freedom of Information requests to evaluate enforcement activities on under-reporting and claim suppression by the WorkSafeBC administration. It is apparent from this further review that the WorkSafeBC administration has not implemented significant enforcement measures to stem the tide of claim suppression or policy measures to reduce the impact of experience rating on compensation entitlement for injured workers.

This is my final addendum to my 2018 Report "Restoring the Balance". In it, I lay out my further review of experience rating and claim suppression. Based on this review I call on the WCB's Board of Directors to discontinue the corrosive policy of experience rating and initiate the steps necessary to restore the original funding model of collective liability which provides a more equitable funding mechanism for employers and a less adversarial system for injured workers.

Later in this addendum I rely on the experience of a worker who suffered life-threating and life-changing injuries to illustrate some of the human impacts that the experience rating system can have on injured workers. Paul Henczel's book, *Crushed Alive*, expresses in his own words some of the challenges workers face in navigating the workers compensation system under the shadow of experience rating.

The B.C. compensation system: as the pendulum swings

In the early part of the twentieth century, provincial governments in Canada adopted workers 'compensation legislation in response to the increasing toll of death and disablement from the industrial revolution. The foundation of provincial compensation systems was based on the social contract between the organized worker and employer communities where injured workers gave up their legal right to sue negligent employers for workplace injuries and illnesses in exchange for no-fault compensation funded by

[5] "Experience Rating: WCB discussion paper", available online at: https://www.google.com/search?client=safari&rls=en&q=Worksafe+BC+experiencing+rating&ie=UTF-8&oe=UTF-8

[6] available online at: https://assets.nationbuilder.com/workereducation/pages/51/attachments/original/1648094008/Claim_Suppression_Review____March_2022-3_(1).pdf?1648094008

employers and administered by an independent agency rather than the courts. It is commonly known as “the historic compromise”.

This historic compromise between worker and employer interests had its challenges. As might be expected, the policy preferences for the workers ’ compensation system often swings with the political winds, requiring intervention from time to time. To manage those challenges provincial governments sometimes appoint a royal commission or other formal inquiry to restore the balance of interests.

In British Columbia, there have been four royal commission reports on workers’ compensation (Sloan-1942, Sloan-1952, Tysoe-1966, and Gill-1999)[7]. Since the 1999 Gill Royal Commission, there have been several key reports. The 2002 Winter Report led to significant cuts to compensation benefits for injured workers. This was followed by the more comprehensive Patterson Report[8] in 2019 which provides a framework for significant reform of the BC workers compensation system and still awaits implementation. The pendulum continues to swing.

The transition from collective liability funding to experience rating

Collective liability

For the first 60 years, the workers ’compensation system in BC was funded primarily by a mechanism based on the collective liability model where all employers in a particular industry covered the costs for all injuries in that industry on an equitable basis.

In practice, this meant that all employers in an industry (for example residential construction) paid the same “average assessment rate” per $100 of payroll and this “average assessment rate” was based on the collective claims cost for all employers in that industry.

The funding mechanism of “collective liability” provided a fully insured accident fund for compensation benefits and services for injured workers and stability for employer payroll assessment rates. As Mr. Justice Tysoe noted in his 1966 Royal Commission report, “Stability of rates is desirable.” (p. 98)

Collective liability funding also provided an incentive for industry wide prevention measures. Hazards common to a particular industry can form the basis for an industry specific regulation to control that hazard. For example, fall protection for construction resulted from an industry wide focus on this hazard, based on the industry wide

[7] Royal Commission Reports can be accessed through this link: https://www.worksafebc.com/en/law-policy/law-and-policy-archives/reports

[8] Janet Patterson, *New Directions: Report of the WCB Review 2019. Available online at:* https://www.worksafebc.com/en/resources/law-policy/reports/new-directions-report-wcb-review-2019/report?lang=en

frequency for that type of injury. Industry associations often supported and promoted industry specific measures. A key objective under collective liability was to control the hazards before the injury occurred.

The adoption of full experience rating

The experience rating system for collecting employer assessments adopted by the Panel of Administrators in 2000 reorganized industry sectors into "classification units," placing the focus on insurance principles rather than a prevention focus.

Under experience rating each classification unit has a base assessment rate, but that rate is "adjusted" up or down for each employer in that classification unit depending on that individual employer's accumulated claims cost record over the previous 3 years. The adjustment can range from a 50% assessment "rebate" if the employer's claims cost is $0 to a 100% assessment "surcharge" if the employer has an exceptionally higher claim cost than the industry average. Where the employer's experience rate falls within this range can have a huge impact on the employer's annual assessment payment to the WCB.[9]

The adoption of experience rating has had a dramatic impact both on how employer assessments are calculated and also on prevention initiatives and workplace safety. Although experience rating was initially intended to stimulate safer workplaces, recent research shows that it has not achieved that effect and "…in some cases it has contributed to unsafe workplaces."[10] This funding change resulted in a significant change in focus for the employer and for the Board. Under collective liability, the focus was on collective prevention action at the industry level with the objective of controlling the hazards to prevent injuries in the first place. Under experience rating the focus shifted to the individual employer's claim cost record and on controlling the claim cost after the injury has occurred.

The introduction of experience rating, as a funding mechanism, has had an even more dramatic impact on benefit entitlement for injured workers in BC and on the integrity and functioning of the compensation system itself. This is the subject of this addendum.

Claim suppression study

[9] The WCB Experience Rating Plan is detailed in the 2020 "Practice Directive 5-247-3(A)" in the WorkSafeBC Administration's Assessment Manual. The experience rating calculator can be found online at: https://ercalcanon.online.worksafebc.com/Default.aspx

[10] Mansfield, L., MacEachen, E., Tompa, E., Kalcevich, C., Endicott, M., & Yeung, N. (2012). A critical review of literature on experience rating in workers compensation systems. *Policy and Practice in Health and Safety, 10*(1), 3-25. Now available on line at: https://doi.org/10.1080/14774003.2012.11667766

The 2020 IW & H claim suppression study defined claim suppression as any overt or subtle actions by an employer or its agent which have the purpose of discouraging a worker from reporting a work-related injury or disease. The study provided scientifically designed worker and employer surveys and examined WCB claim records to identify under-reporting and claim suppression in the B.C. compensation system. The study documented extensive under-reporting of workplace injuries and significant claim suppression activities in B.C. workplaces. Based on this research, the study indicated that the under-reporting rate for time-loss work injuries likely ranged between 40% and 60% of all workplace injuries requiring time off work.

By using a conservative estimate of unreported claims at 45% of all workplace injuries from the claim suppression study coupled with claims data from the 2019 annual report, I calculated that there were approximately 45,000 time-loss injuries not reported to the WCB in 2019 alone. For the estimated 45,000 unreported time-loss claims in 2019, I conservatively estimated that there were at least 225,000 lost days from work. Using a conservative measure of $225 cost per day we get $50,000,000 in 2019 borne by injured workers, their families and the public through taxpayer funded Medical Services Plan and other income support programs covered outside the WCB accident fund.[11]

What systemic conditions allow or foster such extensive under-reporting of workplace injuries and significant illegal claims suppression activities? In my view, there are two factors: the financial incentive provided by experience rating to control claim costs after the injury has occurred and the lack of enforcement of the provisions in Section 73 of the Act prohibiting claim suppression activities "by any means".

This addendum will focus on the primary role of experience rating and its significant impacts, including on employer activities around workplace injuries and benefit entitlement for injured workers. Independent research[12] shows that experience rating:

- provides a financial incentive to employers to under report work-related injuries and illnesses.
- has fueled a significant level of illegal suppression of claims for workplace injuries.
- can promote premature return to work before the worker can safely perform their work duties; and
- can provide a financial incentive to dispute legitimate claims often with hired consultants with experience in adversarial practices.

The WorkSafeBC administration's lack of effective enforcement of the basic requirements of the Act prohibiting under-reporting and claim suppression activities is also a factor which I will review as well.

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[11] The detailed calculations are contained in my 2022 addendum "Claim Suppression: The Elephant in the Workplace".

[12] For example see Ison (1986); Ison (2013); Mansfield (2012).

Failure to enforce reporting requirements

An employer's failure to report a time-loss injury to the WCB is a violation of the legal reporting requirements in section 150 of the BC *Workers Compensation Act*. Failure by an employer to meet this legal reporting requirement can result a penalty of $6,557.34[13] for a first offence under section 150(6) of the Act. Freedom of information (FOI) data show that these provisions are not systematically enforced. According to FOI data:

- In the 4-year period between 2018 and 2021, there were 4 investigations of employer reporting requirements under the enforcement of section 150 of the Act and no penalties imposed for failure to report time-loss injuries.

- In 2024, 20,264 claims were adjudicated without an employer's report of injury and there were zero (0) investigations under section 150(6) of the Act for an employer to meet its legal requirement to provide an employer's report of injury.

Based on documented evidence of tens of thousands of unreported injuries every year, this is a shocking lack of enforcement by WorkSafeBC's administration, the agency responsible for ensuring compliance with the employer reporting requirements in the *Act*.

Failure to enforce claim suppression prohibition

Claim suppression in BC is prohibited by section 73 of the *Act*. Section 73(1) of the BC *Act* prohibits an employer or supervisor from discouraging, impeding or dissuading a worker from reporting an injury, illness or hazardous condition to the Board by any means whatsoever. Section 95 of the *Act* provides for a penalty of up to $798,857.87[14] for an offence under section 73 (1) of the *Act*.

Freedom of information data show that between 2018 and 2021 there were 927 investigations by the Board under section 73(1) of the *Act* mostly related to reports of hazardous conditions and the right to refuse unsafe conditions. Over this 4-year period there were only 4 penalty assessments imposed by the Board for violation of section 73(1) for a total amount of $19,934.06 or $4,983.50 per penalty.

In November 2022 the Provincial Government added a new section 73(2) to the *Act*. This new section prohibited an employer or supervisor from discouraging, dissuading or impeding a worker from "making an application for compensation or receiving compensation". This was considered necessary by some to close a legal loophole, which they maintained could allow claims suppression.

[13] This 2019 penalty amount is subject to consumer price index annual adjustments.

[14] This 2019 maximum amount is subject to consumer price index annual adjustments.

In my view, the difference between the prohibition against preventing a worker from reporting an injury or illness and the prohibition against preventing a worker from making a claim for compensation is a distinction without a significant difference, since a worker reports an injury or illness to the Board by making an application for compensation for that injury or illness. Interestingly, a national health and safety publication[15] touted this minor change to the legislation with the headline "B.C. updates workers comp law to stamp out claim suppression…". In my opinion, this reflects the political spin attached to this cosmetic change.

In practice, the legislative change did not result in any significant increase in enforcement of section 73 by WorkSafeBC's administration. A 2025 Freedom of Information request indicated that for 2024:

- there were 8 investigations completed by WorkSafeBC under section 73(1) of the *Act* with 4 penalties imposed averaging $6,700 each.

- There were 6 investigations under the new section 73(2) of the *Act* with zero (0) penalties imposed by the Board.

Overall, the Board's failure to enforce the basic requirements of the Act prohibiting claim suppression must be seen in the context of experience rating and how, as a funding mechanism, it has changed both employer conduct and the Board's approach to compensation. The Board's lack of enforcement of the *Act*'s requirements and protections is, in my view, an underlying cause of extensive under-reporting of workplace injuries and illnesses and of deep-rooted claims suppression.

The impact of experience rating on compensation entitlement

Experience rating strikes a three-fold blow to injured worker's entitlement to benefits and rehabilitation under the *Workers Compensation Act*.

- First, claims that are suppressed or un-reported illegally deprive the injured worker and their family of their right to compensation payments.

- Second, experience rating has inhibited the inquiry system at the heart of workers compensation entitlement and reintroduced the adversary system where legitimate claims are often systematically opposed to keep claim costs down.

[15] *OHS Canada;* Nov. 1, 2022 https://www.ohscanada.com/features/b-c-updating-workers-comp-law-to-stamp-out-claim-suppression-require-re-employment/

- The third blow to injured workers is the pressure for workers to return to work as soon as possible, often before they can safely perform their job duties, exposing them to reinjury.[16]

Decision making in workers' compensation has a primary objective to ensure compensation entitlement is granted fully and fairly where it is due under the *Act*. The secondary imperative is that due benefits should be administered in a cost-effective manner that protects the integrity of the accident fund. In my 50 years of experience in and around the BC workers 'compensation system I have observed a subtle, but systematic shift in the decision-making focus with the transition from collective liability to experience rating.[17]

In my experience, decision making under collective liability encouraged decision makers to focus more as "guardians of entitlement" by granting due entitlement after inquiring into the circumstances of the claim. Decision making under experience rating encourages decision makers to focus more as "defenders of the accident fund" putting the onus on injured workers to prove their case. The challenge for policy makers is to ensure that the primary purpose of the legislation — to grant due entitlement to compensation benefits under the Act — is given priority while ensuring that entitlement is delivered in a cost-effective manner.

The distinction between decision making and decision makers is an important one. There are many decision makers employed by WorkSafeBC's administration who are committed to providing compensation entitlement where it is due and restoring injured workers to safe, productive and sustainable employment. Under experience rating these decision makers must themselves navigate the bureaucratic hoops and administrative hurdles that the compensation system under experience rating now requires. The computerized adjudication system introduced in 2008 that tracks and evaluates their benefit entitlement decisions is only one of these hurdles. Managerial oversight of the decision making process is also a factor that was identified when I conducted the 2018 review.

A return to a collective liability funding model would allow these decision makers to better meet their legal obligations as guardians of entitlement and reduce the pressure requiring a greater focus on being defenders of the accident fund.

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[16] The issue of restoring injured workers to safe, productive and sustainable employment is an important issue, particularly considering the rehabilitation provisions introduced by Bill 41. This issue is beyond the scope of this addendum and is better addressed by those who are directly involved in dealing with the emerging impact of Bill 41 on injured workers.

[17] Twenty-eight of those years were either as a workers 'adviser/advocate before 1990 or as an appeals adjudicator after 1990. I conservatively estimate that I was entrusted to handle over 4,000 cases either as an advocate or as an appeals decision maker with full access to documentation on the injured worker's confidential claim file.

The claim cost preoccupation under experience rating has become ingrained into the culture of the B.C. workers' compensation system. It permeates the decision-making process at the mundane claim management level where a decision on whether to accept a secondary condition in a complex claim can have significant cost implications for the employer's experience rated assessment and more importantly for the injured worker's benefit entitlement.

Experience rating also brings the adversary system back into play and undermines the inquiry system that was a cornerstone of the historic compromise. The transition from collective liability funding to experience rating funding sensitizes employers to the costs associated with each claim and incentivizes them to minimize those costs wherever possible and all to often by whatever means available. Employers who engage in under-reporting and illegal claim suppression gain a competitive advantage over responsible employers that fully meet their reporting requirements.

Experience rating in action: one worker's case study

The overall impact of experience rating on benefit entitlement for injured workers is extensive and in some individual cases can be tragic. Paul Henczel's book *Crushed Alive*[18] describes some of these impacts on injured workers under a compensation system that is driven by experience rating. I use excerpts from his book to illustrate some of these impacts from the perspective of an injured worker.

On February 9, 2010, Paul Henczel's life hung by a slender thread. Here is how he described it:

> *I was being crushed.*
> *Like in a terrible dream, I tried to scream but I wasn't sure if any sound passed through my lips. All I could hear was the crunch and gurgle of my bones and flesh being compressed beneath thousands of pounds of wood. The pressure in my head was so intense I wondered if it was on the verge of exploding.*
> *Is this how I'm going to die? I wondered. Is this it?*

Earlier I noted that experiencing rating provides a financial incentive for employers to dispute claims and has changed the compensation "entitlement" system itself. Mr. Henczel's case was no exception.

Early on in Mr. Henczel's claim a dispute arose about how long he was unconscious while crushed by thousands of pounds of large logs. One of his most serious injuries was the traumatic brain injury resulting from the lack of oxygen for a prolonged period. He had multiple rib fractures, and his right lung was punctured and collapsed, and he had a fractured sternum.

[18] Paul Henczel, *Crushed Alive* (2019); Affective Communications. Quoted with permission.

There was clear evidence that he was deprived of oxygen for well over 5 minutes, but the employer disputed this, apparently to question the severity of the injury. The compensation board followed the employer's lead. Henczel notes:

> *My insurance company has always attempted to minimize the time I was unconscious without oxygen, ignoring the facts.* (p. 53)

Mr. Henczel's near death experience that occurred in slow motion left him with a significant Post Traumatic Stress Disorder.

> *In July 2012, my insurance company concluded that all my physical injuries had healed and that my ongoing problems were due to "a pain disorder" implying that my pain was all in my head. That just made things worse because I knew that was not true. Furthermore, my practitioners, including my psychologist, knew this was not true. She always reported that everything I was experiencing was symptomatic of my PTSD and my medically documented physical injuries.* (Crushed Alive, P. 79)

Early in Mr. Henczel's case the "insurance company" pressured him to get physically demanding physiotherapy so he could return to work as soon as possible. He wrote:

> *I was pushed into physiotherapy too soon, made to do exercises someone with my injuries should not do …. Anytime my heartrate would increase, my migraines and post-concussive symptoms would follow immediately.* (Crushed Alive p. 34)

One of the vexing problems Mr. Henczel had to endure was the denial of his right shoulder injury by the "insurance company." He wrote that shortly after the accident:

> *Some of the worst pain I have ever felt came in the emergency room right before my CT exam. When the doctors had to raise both my arms over my head, it made my right shoulder feel like it was being ripped from its socket. From that moment, I knew I had a problem with my shoulder.* (Crushed Alive p. 61)

When his "insurance company" doctor didn't recognize the right shoulder problem, Mr. Henczel paid for an independent medical examination which documented atrophy of the right para-spinal muscles and "… *gross abnormalities of the right shoulder complex*." (P. 61).

Mr. Henczel points out that eight weeks after that independent exam was provided to his case manager:

> *…the insurance company case manager and medical advisers concluded that my shoulder injury had healed. (*p. 61)

> *Unfortunately, it took close to four [more] years to obtain the MRI of my right shoulder. That MRI revealed tears to my rotator-cuff and labrum tendons and tendonisis in two other tendons.*
>
> *The insurance company medical advisors [then] concluded that my documented shoulder lesions were the result of the aging process.* (p. 62)

After several successful appeals Mr. Henczel concludes:

> *Although my insurance company finally acknowledges my shoulder injuries, I am [at the time of publication] still awaiting approval for surgery. That company's neglect and denial of my injuries has been a complete injustice.* (p. 62)

Later in *Crushed Alive*, Mr. Henczel reflects on how he possibly survived that enormous slow motion crush of wood on February 9, 2010 and sheds some light on the significance of his shoulder injury:

> *I have only one explanation as to what could have possibly aided in my survival. My right arm and shoulder were crossed in front of my sternum, and took the brunt of the impact and force. I believe if my arm was not crossed in front of my body the way it was, my chest and major organs would have received the direct impact. This would have probably killed me. This is just my opinion, but I believe it makes sense.* (p. 109)

Based on my experience with individual compensation cases over the course of my 50 years in and around BC's compensation system, the treatment Mr. Henczel experienced of systematic denial at the hands of his "insurance company" is not unusual. To be sure, very few claims are as complex as Mr. Henczel's, and not all workers receive the same level of systematic denial that Mr. Henczel experienced. However, based on my direct experience too many injured workers are faced with a subtle, and sometimes not so subtle, system of denial of due entitlement under the shadow of experience rating.

Mr. Henczel refers to the compensation system as the "insurance company" and this is especially insightful. The transition from collective liability to an experience rating system has attracted many of the negative trappings often associated with the insurance industry. In my experience the compensation "insurance" system ensures that the accident fund is now managed with a view to minimizing claim costs for employers, all too often at the expense of due entitlement to the injured worker.

In September 2024 B.C. employers called for the WCB to distribute to employers the $2 billion "surplus" achieved under experience rating. Instead, the WCB used the "surplus"

to subsidize employers 'experience-rated assessments[19]. A 2023 media report indicated the WCB: "spent $1.7 billion on subsidizing payments for employers from 2019 to 2023 alone."[20]

As compensation system reviewer Janet Patterson pointed out in her 2019 comprehensive report *New Directions: Report of the WCB Review*[21]:

> *After 2002, the [compensation] Board began to identify itself as a special type of insurance company created by the Government….*
>
> *Absent from the insurance model is any recognition that workers and employers are stakeholders, and equal stakeholders, in a compensation system. Employers are premium paying "customers" and the system's role is to provide "coverage" (not compensation) for insured events (injury). The obligation for oversight is for the "well-being" of the compensation system. Workers as legitimate participants are invisible.* (p. 47-48)

The shift from collective liability funding to experience rating has subtly but systematically shifted BC's workers 'compensation system from an "entitlement" focus based on the original inquiry system established under the historic compromise to a "disentitlement" focus under the adversary system incentivized by experience rating.

Restoring the balance

The imbalance in the B.C. workers 'compensation system has reached a critical juncture. Compelling independent and reliable evidence shows that the current experience rating funding mechanism is providing a financial incentive for far too many employers to under-report workplace injuries and to engage in illegal claim suppression. The financial incentive impact of experience rating is contrary to the purpose of the *Workers Compensation Act* to grant compensation for all injuries and illnesses arising out of a worker's employment. This financial incentive undermines the integrity of BC's workers 'compensation system itself.

But it gets worse. The available evidence shows that the enforcement of the employer claim reporting requirements and the prohibition against claim suppression are virtually non-existent. In my view, this lack of effective enforcement should serve as a major

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[19] WorkSafeBC should provide rebates with $2billion surplus: lobby group", Vancouver Sun, September 1, 2024. online at: https://www.cbc.ca/news/canada/british-columbia/worksafebc-surplus-small-business-1.7310770

[20] "What to do with WorkSafeBC's Giant Pot of Money?"; The Tyee, October 2023. Online at: https://thetyee.ca/News/2023/10/03/WorkSafeBC-Pot-Money/

[21] Janet Patterson, *New Directions: Report of the WCB Review 2019. Available online at:* https://www.worksafebc.com/en/resources/law-policy/reports/new-directions-report-wcb-review-2019/report?lang=en

embarrassment to WorkSafeBC's administration. The WCB has recently established an OH&S "team" to investigate claim suppression under section 73 of the *Act* along with a range of other issues. There has been some media coverage resulting from this initiative.[22]

Claim suppression investigations are largely complaint driven and are processed somewhat bureaucratically from the claim adjudicator who may receive the complaint. The complaint is referred to the adjudicator's manager, then to the field investigation department, and eventually to the OH&S team's prevention officer to address the complaint. WorkSafeBC's administration did not see the advantage of my 2018 recommendation #20 that the administration adopt a streamlined referral where the claim adjudicator would document the allegation of claim suppression and refer it directly to the Board's legal department for direction and action. Based on the available evidence, the "process" adopted by WorkSafeBC's administration it is, in my view, too little and too late. The horse left the barn a long time ago.

In the 2012 Ontario report "Funding Fairness"[23], author Harry Arthurs addressed the emerging evidence that experience rating in Ontario was creating incentives for abuse such as claim suppression. Arthurs concluded that this evidence of claim suppression created "a moral crisis" for the Ontario Board since it had "failed to take adequate steps to forestall or punish illegal claim suppression practices." (p.81). Arthurs added:

> Unless the WSIB is prepared to aggressively use its existing powers — and hopefully new ones — to prevent and punish claim suppression, and unless it is able to vouch for the integrity and efficacy of its experience rating programs, it should not continue to operate them." (p. 81)

The BC compensation system is in a far worse position now than Ontario was in 2012. WorkSafeBC has received clear and compelling evidence in the IW&H claim suppression study documenting the nature and extent of claim suppression in B.C. The failure of WorkSafeBC's administration to take substantial measures to stop under-reporting and claim suppression in response to this compelling evidence, makes it a complicit partner in the "moral crisis" that now undermines BC's compensation system.

The B.C. Provincial Government provides oversight on the Workers' Compensation Board and is ultimately responsible for ensuring that the B.C. workers 'compensation

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[22] Dacre, C. (2024, May 23). *WorkSafeBC fines Kelowna company over 'claim suppression'.* Castanet. https://www.thesafetymag.com/ca/topics/safety-and-ppe/furniture-manufacturer-fined-for-allegedly-dissuading-worker-from-reporting-injury/491317.
For more detailed local coverage of this interesting case see: https://www.castanet.net/news/Kelowna/488770/WorkSafeBC-fines-Kelowna-company-over-claim-suppression-#:~:text=WorkSafe

[23] Harry Arthurs, *Funding Fairness;* available online at https://www.wsib.ca/sites/default/files/2019-03/fundingfairnessreport.pdf

system is administered in accordance with the purpose of the *Workers Compensation Act.* The available evidence shows that WorkSafeBC's administration has pursued a path through experience rating that undermines the very integrity of BC's workers' compensation system.

In the late 1990's the WCB's governing Panel of Administrators enacted the new policy to fully implement an experience rating funding mechanism. Based on my 50 years of direct experience with the BC workers compensation system, it is my opinion that experience rating has failed injured workers and has betrayed the fundamental principles of the historic compromise initially established between the worker and employer communities.

More than four years after the IW&H claim suppression study, the WorkSafeBC administration has not taken any substantial measures to reverse the impact of experience rating on injured workers. The time has come to echo Harry Arthurs ' guidance and address the "moral crisis" fostered by experience rating and discontinue the corrosive policy of experience rating.

In my 2018 report to the Minister and the WCB Board of Directors, "Restoring the Balance", I made 34 recommendations, most of which the WorkSafeBC administration has implemented. In my 2022 addendum— "Claim Suppression: the elephant in the workplace" — I summarized key findings from the IW&H claim suppression study and offered 13 recommendations for WorkSafeBC's administration to consider. Those recommendations were directed primarily toward preventing under-reporting of workplace injuries and illnesses and claim suppression activities. Those recommendations were largely ignored by WorkSafeBC's administration.

For the reasons provided in this addendum, I now call on the WCB Board of Directors to discontinue the policy of experience rating and to take the necessary steps to reinstate collective liability as the primary funding mechanism for the BC Workers 'compensation system.

I therefore add the following recommendation to my original report:

Recommendation 35.

That the WCB Board of Directors initiate the steps necessary to transition from the current experience rating system to a collective liability focused funding mechanism in consultation with representatives from the worker and employer communities and with injured workers.

Since the move to fully embrace experience rating in the 1990's was a policy decision by the then governing Panel of Administrators, it is open to the now governing WCB Board of Directors to set in motion the steps necessary to change this policy.

As a first step, the Board of Directors may wish to study the collective liability funding mechanism in the Yukon. The Yukon's "Super-Assessment Policy" offers a creative "modification" to experience rating, using a collective liability focus[24]. The Yukon Super-Assessment policy provides leadership in Canada to re-establish the principle of collective liability and places the priority on incentives that promote prevention initiatives and control of the hazards that cause injuries in the first place rather an incentive on controlling the claim costs after the injury has occurred.

BC's Provincial Government has the final responsibility to ensure that the *Workers Compensation Act* is administered to achieve the primary purpose of the legislation to provide full and fair compensation for workplace disablement and restore injured workers to safe, productive and sustainable employment. The WCB Board of Directors have the primary responsibility to establish policy direction that will ensure that injured workers receive the compensation benefits that they are legally entitled to under the *Act*. I urge the Board of Directors to act decisively on this important policy issue.

Paul Petrie
April 17, 2025

[24] Yukon WCB "Super-Assessment Policy", available online at: https://www.wcb.yk.ca/policies/employer-assessments/5-8-super-assessment