UNITED STEELWORKERS
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UNITY AND STRENGTH FOR WORKERS

District 3
Western Provinces and Territories

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Reviewer
Workers' Compensation System Review 2019

July 19, 2019

United Steelworkers District 3 Submission

District 3 of the United Steelworkers (USW) is comprised of all USW Local Unions in the four western provinces of Canada, and this submission is written on behalf of all of the BC members of our District - active and retired, though some of the Local Unions and members will also be making individual presentations and/or submissions more specific to their localized or individual issues. The intent of this submission is to give an overarching perspective on problems encountered and with the policies and practices currently in place, as well as to provide opinion on the positive changes that we believe can be implemented as a result of your review.

United Steelworkers represent thirty-five thousand workers in British Columbia, in fourteen different Local Unions, at hundreds of worksites in various industries and services across the province. Our members work or have worked in mining, forestry, health care, manufacturing, processing, fishing, gaming, non-profit organizations, construction, transportation, rail, telecommunications, education and retail – in all areas of British Columbia, urban, rural, and remote. Some of our Local Unions are large enough to have the capacity to assist their members with Workers' Compensation claims and appeals, but this has become increasingly difficult as the legislative and policy changes beginning in 2002 have created more complex and onerous systems and processes.

In every document produced about any workers' compensation matters, one will find reference to the genesis of the system in Canada and then BC – from a labour perspective we always refer to it as the "historic compromise", when employers were guaranteed freedom from litigation by their workers for injury, and those workers were guaranteed to be compensated on a without fault basis, for injuries suffered in the course of their work. In BC, the *Workers' Compensation Act* (the Act) also mandates occupational health and safety regulation and enforcement, but that portion of the legislation does not form a part of this review, so we will reserve comment on those

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matters. It does, however, force the Workers' Compensation Board to prioritize its activities between compensation and regulation.

The terms of reference for this review are focused on support for injured workers through improved case management and services that will bring the Board to a more worker-centric model, in which workers will be confident.

Key to the system, and noted in the first point of your terms of reference, is supporting injured workers in their return to work. We must, however, also insist that support for those who became injured while working includes support when they are no longer working, and so it is a return to normalcy, to being made whole, that becomes the focus for these workers.

To give shape to our comments, we will order them as they become relevant in the life of a compensation claim, outlining the various concerns, unnecessary roadblocks and hurdles and potential remedies as we see them.

First, there is the initial filing of the claim. When a worker is hurt, they can describe what it feels like, what the mechanism they encountered was, and what resulting ability or disability they have. What they are not generally qualified to determine is a complete and accurate diagnosis, nor necessarily a complete list of causative factors. The physician's initial report will contain a chief complaint, perhaps recommended treatment, maybe recommended further investigation, and a quick estimate of recovery. The employer's first report is often a copy of the worker's statement, or a first aid report. The claim is filed, and if it is straightforward, a computer-generated response occurs. If there are more complex issues, CSRs, Entitlement Officers, then Case Managers will get involved in making the original and subsequent decisions on the claim. *Rehabilitation Services and Claims Manual Volume II* (RSCM II) Policy #98.00 comes into play:

> *"#98.00 INVESTIGATION OF CLAIMS*
> *In the majority of claims the issues are decided by reference to the information received in the worker's application and the employer's and medical reports. Any insufficiency in the information is usually made good by telephone, correspondence, or by informal interview. In a minority of claims, a more formal inquiry, or medical examination, may be necessary"*

Since generally neither the worker, the employer nor the physician are particularly schooled in the policies and procedures of the Workers' Compensation Board (the Board), the reports filed do not always contain sufficient information for a reasoned claims adjudication decision to be made. Policy #98.00 is problematic, because it does not direct the Board to conduct a thorough or balanced or complete investigation into the claim, it just suggests that a phone call will likely fill in any gaps. Our experience in

representing workers shows that frequently, the first and often only call made will be to the employer, to get details on the claim. The employer has a financial stake in the outcome of any claim decision, so their information, while critical, should be viewed at least potentially, as having bias. Without a more complete investigation, the Board policy is satisfied in any case, and a decision can be made. Too often, we have represented workers in appeals where a phone call to the worker would have clearly identified any aspect of the claim in dispute, thus directing the Board to do a deeper dig to find objective evidence prior to making a decision. Unfortunately, instead often the first call to the worker is to advise that the claim is not being accepted. Without prior discussion as to the specifics of the claim, this call can be devastating for a worker, and so the response and thus the relationship with the Board is set very early and impacts the relationship negatively from the outset.

Another significant problem can arise on initial adjudication of a claim. If the worker is suffering a re-injury, or a deterioration of a compensable condition, they have to know that first, and apply appropriately. There is no onus on the Board to ask the question regarding re-injury or new injury, and a worker would have no way of knowing that there will be a significant problem down the road if an old claim is ignored or invoked incorrectly. Once decisions have been made, a worker can go through both levels of appeal, being denied benefits on a reopening, simply because the original decision was made on the basis of a new injury, and the finding was no new injury.

Similarly, the worker is expected to know if they are filing a claim for under Section 5, for an injury, or Section 6, for an occupational disease. Again, a worker can file a claim for what seems like an injury, perhaps an elbow that is problematic, and be denied because the eventual diagnosis shows it to be epicondylitis, a disease.

What the worker understands is that their claim is denied, they do not understand that question of a re-opening or disease has to be made separately from an injury claim. This can lead to delays of months or even years in the process as reviews and appeals can be heard with all levels indicating they have no jurisdiction to make a new decision on the matter.

RSCM Vol II Policy #98.00 should be amended to direct the Board to conduct a thorough review of all evidence provided and required to initiate a claim, to ensure that it is complete enough to allow for a reasonable adjudication, if there is any question regarding acceptance of the claim. In addition, the adjudicator should be directed to consider whether the claim is for a new injury or a re-opening, for an injury or an occupational disease so that all possibilities are correctly examined at the beginning of the claim.

If a claim is accepted, and there is an issue of wage loss and/or disability, decisions are made on several fronts. First, the worker's wage is assessed. As noted above, workers

cannot sue their employer for lost wages, but are supposed to be compensated. The legislation was changed in 2002 to ensure that they would not be fully compensated. Instead, a consideration of what their net pay would be is made, and they are granted coverage for 90% of that, subject to a maximum, which is currently $84,800. So, at a bare minimum, the worker is losing 10% of their normal pay. In reality, most lose more than 10% of their net – according to Canada Revenue Statistics, more than 20% of workers earned above the Board maximum in 2015. Regardless, workers are not able to sue their employers for any portion of their earnings, though so the protection for the employer remains guaranteed, for the worker it is no longer guaranteed.

When the changes to the legislation were made, it was implied that this would provide a disincentive for workers, ensuring that claims are not inappropriately made. What was not made clear was why a disincentive was necessary. It is very clear to see that it did achieve the goal, however. Claims accepted dropped drastically from 169,509 in 2001 to 156,814 in 2002 and 152,106 in 2003. Accepted compensable fatalities, however, increased from 193 in 2001 to 232 in 2002 and 219 in 2003. Why would the overall level of claims decrease when the level of serious claims increased? Disincentive – if a worker is faced with losing income, calling in sick for full pay, or coming to work injured without any time loss is preferable. The resultant savings in claims costs have been given back to employers.

A win-win situation for employers, but not for workers.

Taking a sick day instead of filing a claim means that real prevention issues are not addressed, but also means that the worker will not have access to compensation at any time later on if the condition gets worse or recurs, as the original injury would be deemed non-compensable since no claim was filed.

Restoring the balance of full compensation for waiving of legal rights is absolutely critical to restoring a just compensation system. USW recommends that injured workers be compensated for all of their earnings loss, not just for a portion, and not for a reduction from the whole.

If a claim is filed, and accepted, benefit entitlement begins, and in the best-case scenario the worker will have strong supportive medical care and be able to make a full recovery from any injury, exposure or disease. Definition of that full recovery can be problematic. The Board has accepted time frames in which they expect a given injury to resolve. If a specific worker fails to recover in that time frame, problems can arise. Usually, the expectation of a resolve date is supported by a Board Medical Advisor (BMA), a doctor hired by the Board to provide a diagnosis and or prognosis via file review only, on any manner of illness, disease or injury. If a worker does not agree with a BMA opinion, the only option is for the worker to go out and get another medical opinion. This can be extremely costly, and the worker's own physician may not have the time, the willingness or the resources to devote to providing a reasoned opinion. Workers' Advisors will not pay for such reports, so unless the injured worker is fortunate

enough to be represented by a Union that will shoulder the costs in hopes of recovery later, they are left without resources.

The BMA is most often a general practitioner, does not examine or treat the injured worker, and is funded for their services by the WCB. Since the injured worker still needs to have treating caregivers, these BMAs seem an unnecessary expense for the Board. Why not seek medical clarification when required from the practitioners actually involved in the worker's care?

If there is a concern that the medical information provided by the worker's treating caregivers is not sufficiently unbiased, a truly independent opinion should be sought, not from someone on the payroll of the organization that is trying to reduce the claim costs.

The Board should rely on the medical information provided by the worker's treating physicians, and should seek clinical opinions from the treating physicians when further information is required on a claim.

With respect to the practice of estimating recovery dates, this is purely a budgetary speculation construct for estimating claims costs, or rather it should be. In reality, however, workers often have their benefits terminated when they fail to recover fully in a prescribed time frame. This is particularly prevalent in cases where some form of work-hardening or occupational therapy has been approved. This therapy is contracted out to a third party provider, and the contract is generally for a fixed term. Since the contractor will only be paid for that fixed term, the worker is considered recovered at the end of the time frame, often completely without regard to the worker's actual ability to return to their pre-injury work. Occupational therapy and work-hardening programs should be more carefully monitored by the worker's own physician, to determine if there is recovery or benefit.

Prior to 2002, there was a system in place, though it was a last stage of appeal, which provided for a balanced medical team to review medical issues, and the worker had some input as to the selection of expert medical personnel utilized.

A form of Medical Review Panel should be re-instituted, so that when there is a medical issue that requires expert adjudication, it can be dealt with by qualified practitioners.

One of the primary goals of a workers' compensation system is to assist an injured worker in returning to active meaningful employment. Best case, to their pre-injury employment with their pre-injury employer. To accomplish this, the Act defines vocational rehabilitation in Section 16:

> *"Vocational rehabilitation*
> *16 (1) 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.
(2) Where compensation is payable under this Part as the result of the death of a worker, the Board may make provisions and expenditures for the training or retraining of a surviving dependent spouse, regardless of the date of death.
(3) The Board may, where it considers it advisable, provide counselling and placement services to dependants."

Unfortunately, the Board was given no tools to incent employers to bring disabled workers back to the workplace, or to encourage proper accommodation where required to assist an injured worker in returning to work. Where employers simply respond to the Board that they are not willing to take back a worker with any level of disability, the Board cannot pursue the matter in any form, and the worker's only option is to file a human rights complaint for a failure to accommodate. In the midst of a compensation claim, this is an unnecessary and confusing burden for a worker. The same conflict between the equivalent compensation policies in Quebec and their human rights charter were recently tested at the Supreme Court of Canada (*Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron, 2018*). The SCC determined that the Charter rights had to be upheld by the compensation policies, stating:

> *There is no reason to deprive someone who becomes disabled as a result of an injury at work of principles available to all disabled persons, namely, the right to be reasonably accommodated. An injured worker's rights and entitlements under the Act must therefore be interpreted and implemented in accordance with the employer's duty to reasonably accommodate an employee disabled by a workplace injury. An examination of the Act's goals and policies as well as the entitlements it sets out — such as reinstatement, equivalent, or suitable employment — reflect a statutory scheme that clearly anticipates that reasonable steps will be taken to assist the disabled worker in being able to work if possible. The duty to reasonably accommodate serves to inform how these entitlements are to be implemented on the facts of any particular case short of undue hardship.*
>
> *Implementing this duty in light of the Charter does not disrupt the carefully calibrated duties and relationships that are set out in the Act. It merely requires a more robust approach to the implementation of the rights of disabled workers by the CSST and CLP and, by necessary implication, the employer.*

The duty to accommodate a disabled worker is clear in human rights law, and since the Board's role is to aid in getting injured workers back to work, the Board should be able to enforce the obligation. USW supports a change in legislation and policy to give the Board the appropriate tools to ensure employers uphold their legal responsibility to accommodate.

In 2002, the government decided to put a truly literal lens on the word "may" in Section 16 of the Act, and created policy to significantly limit the opportunity to provide any meaningful form of vocational rehabilitation. There developed a significant focus on the fact that vocational rehabilitation services were entirely discretionary, the Board was under no obligation to provide any such services. This seems at odds with a goal of assisting workers in a return to work. When coupled, however, with the new language of Section 23(3) that determined that no worker would be given consideration regarding their loss of earnings unless it was "so exceptional" – exceptionally undefined, but in the earliest days of this new legislation it was an impossible bar to meet. It has since been adjusted without any visible policy to mean that if the earnings loss is 25% or more, it could be considered exceptional. Of course, that only means within the parameters of the Board's maximums, so a high wage earner could be experiencing a far greater loss, but it becomes unmeasurable by the WCB if the starting point is above the statutory maximum. So, since there is virtually no way to incur a loss of earnings due to an injury, there is no longer any need to provide rehabilitation. Workers will recover, or not, and will go back to work, or not, but it will be their own responsibility. To ensure that this new system would be held up, the government decreed that the appeal process outlined in the Act would not be available for any Section 16 issues, since they were entirely discretionary in the first place.

This was perhaps the most callous change in terms of attempting to manoeuver the compensation system into a budget-driven insurance plan.

Budgetary concerns were made paramount – if there was no significant loss of earnings, there need not be any vocational rehabilitation offered. If there is a significant loss, limited services may be offered, beginning with work-hardening programs and escalating to a maximum of a twenty-six week retraining program in rare occasions. Additionally, if there is to be any vocational rehabilitation plan offered to a worker, there will only be one plan. Workers must sign off on the plan, without really understanding that they are committing that they cannot fail, that the program cannot be deemed unsuitable as it progresses, because if that happens, they are deemed to have failed themselves, and will not have access to any further assistance. For a worker who may have been engaged in one specific occupation for their entire work life, the shift to having to consider an alternative form of employment is daunting, and often beyond their ability to predict.

When training opportunities are identified, they tend to fall into tidy short term packages that meet the budgetary constraints, but often have no regard for the skills and abilities of the worker. Workers who have a career based on specialized physical and mechanical skill sets may struggle to return to any formal academic program, but that is often what is prescribed. USW members injured in the mill explosions in northern BC suffered concussion injuries, and post-traumatic stress conditions; their workplaces had been eliminated, and retraining was considered. Some of these workers were enrolled in computer upgrading courses, without consideration of the effects of their injuries. Not surprising for workers who did not have any academic background, who suffered head

and psychological injuries, they were not able to succeed when placed in front of a video screen to learn. The current system does not allow for the WCB to consider the effect of a failure of a vocational rehabilitation plan on the worker's well-being.

A person who has been in the workforce for a significant portion of their life will often define themselves by the work that they do; the loss of the work is also a loss of their sense of self, of their dignity. The compensation system needs to take this loss into consideration in order to best determine any program that will help the worker return to meaningful employment.

The vocational rehabilitation policies may have softened slightly since the original changes in 2002, but RSCM II Policy C11-88.00 still states:

> *"Financial Implications/Cost Effectiveness*
> *Each plan must set out the financial implications of implementing the plan and/or its cost effectiveness. The analysis may include such things as a comparison of the estimated cost of the necessary vocational services, the remaining compensation benefits that the worker is entitled to, the estimated cost of alternative rehabilitation plans, and the estimated benefit costs if no return to work services are provided.*
> *The analysis must also set out when it is expected that specific costs will be experienced."*

So clearly, if there is not any "exceptional" loss of earnings, there are no increased claims cost if no return to work services are provided, regardless of the impacts on the worker's ability to become meaningfully and gainfully employed at a level equivalent to their pre-injury state – to be made whole.

Case Managers and Vocational Rehabilitation consultants within the employ of the WCB are schooled to manage budgets on claims first, and manage worker's needs second. The policy noted above does not direct the Board to consider the impact on the worker when no return to work services are provided. It does not direct the Board to consider the impact of being ejected from employment on the worker as a whole person. If a worker's self-worth is tied up in their definition of "what they do", or their occupation, as it very often is, how can any consideration of rehabilitation not consider the impact of eliminating or significantly altering that self-worth definition? If I am an electrician, what am I when my injuries now preclude me from doing electrical work? If I valued my skills in my trade, and I can no longer ply that trade, where is my value?

Assisting a worker in re-establishing their sense of worth in the workplace is an integral part of making them whole. To truly return the system to a "worker-centric" model, a massive reconsideration of the ways in which rehabilitative services are offered and delivered is essential.

- **The focus of rehabilitation needs to shift to making the worker whole as much as possible, and this means that primary consideration must be given to how to enable a worker to return to their pre-injury state, in terms of health, dignity and employment.**
- **Workers should have full rights of appeal to challenge decisions made regarding vocational rehabilitation services provided or withheld.**

This raises another significant concern for Steelworkers, who often work in processing, milling and mining operations where they are exposed to conditions that may not cause immediate disability, but which will become disabling later in life, perhaps after retirement. The present system provides no form of compensation other than health care benefits for a worker who has retired, since there is no loss of earnings. There is, however, distinct disability, and in some cases the exposures will ultimately be fatal. When a worker retires from direct employment, it is to enjoy the fruits of that labour, to be able to find leisure – this is why we work, why we retire. To suggest that there is no culpability when a workplace exposure eliminates that retirement opportunity is absurd. Prior to 2002, there was recognition that workplace injury or disease could have lifelong implications, and pensions were established to reflect that. Today, that is not the case – pensions cease either at real retirement or at a fictional construct of expected retirement, and there is no consequence to the accident fund for any losses or fatalities suffered beyond that, regardless of cause.

WCB statistics show that the numbers of deaths due to occupational disease exceeds traumatic deaths, and has since 2010. Accepted death due to asbestos exposures has been increasing for the past thirty years, and that is only known workplace exposure deaths. Since the legislative changes in 2002 eliminated any form of pension for workers who had already retired, there is little motivation for a worker diagnosed after retirement to file a claim. Since asbestos exposure results in long latencies prior to onset of any disease it is more than likely that there are significantly more workplace related asbestos disease fatalities than will be reported. As yet, there is no system in place to effectively monitor workplace related asbestos exposure disease and death if claims are not filed directly by workers or their families, so in addition to failing to compensate these workers and their families for the harm done to them in their workplaces, the true extent of the effects and scope of the exposures becomes less clear, and therefore the need to eliminate the hazard attracts less focus.

USW takes the position that disability and culpability do not cease at retirement, and that workers who are disabled or killed due to workplace exposures are entitled to monetary compensation to reflect the effects of that disability on their lives.

Changes made to the review and appeal processes in 2003 have had the effect of making the system more complex for the average worker. The prior system entailed an oral hearing first as the initial level of a dispute with the WCB. Since the process was designed to be an inquiry system, the worker could come to a hearing and explain their situation in their own terms. The then Review Division Vice Chairs would have access to the file in advance and could ask the worker questions to ensure they had a complete picture of the issue prior to making a decision. Workers could be heard, and representatives could assist to ensure the information was complete, but even without a representative, the Vice Chair had the ability to discuss and inquire on all aspects of the dispute. Additionally, the Vice Chairs had to follow the Act, but not bound to follow policy when it did not make sense to do so given the specifics of an issue. When the system was changed in 2003, policies effectively became law, and the first level of dispute went to the Review Division, normally handled via written submissions. So, a worker has to know in advance what information they need to communicate to the Review Officer, and should be able to cite the policies and law that apply. This is often beyond the scope of the worker, and so their representation becomes more crucial to allowing them to be properly heard. For many Local Unions, the increasing complexity created by making all of the policies binding, and by dictating that the first level of appeal required a written submission meant that providing members with skilled representation became financially untenable. USW Locals that are not large enough to finance staff that can offer skilled representation refer their members to the Workers' Advisors. Many other unions do the same, and of course the Workers' Advisors are the only service available to workers without a union. The Workers Advisors do not have sufficient resources to represent workers; they do not have sufficient funds to obtain medical information when it is needed for a claim, and they have to limit the extent of representation they can offer.

While it would be preferable to have a system that workers could navigate on their own, USW recommends that at this time there be an increase in the funding provided for the Workers Advisers, so that they can participate fully as worker representatives, including writing submissions, obtaining evidence, and attending oral hearings to represent workers.

In addition to changing the ways in which compensation services are administered, the culture change to a worker-centric model that the Minister of Labour is seeking requires a top down view that respects that culture. This means looking at the measures the Workers' Compensation Board uses to evaluate its success. The key performance indicators (KPIs) outlined in the Board's current annual report reflect some conflicts in terms of setting worker-centric priorities.

USW is concerned that the focus of the KPIs is not on actual safety, nor on effective compensation. The first measure looks at the number of claims "first accepted" and seeks to reduce that. Unfortunately, reduction in initial acceptance can be achieved by denying claims. A more relevant indicator of safety would be the number of claims filed,

but even that may be skewed by avoidance issues created through under benefiting workers, as discussed earlier.

The next two KPIs are about return to work – improving the number that return to work, with or without vocational rehabilitation services. Again, what does this mean? What financial options does a worker have? If benefits are not being paid, a worker has to return to work – people must survive. The listed measures do not contemplate whether or not the worker fully recovered, or was able to return to their pre-injury occupation. There is no contemplation of the measure of satisfaction with the work returned to, or with the level of ongoing disability that the worker may or may not be left with, or even of their ability to remain employed.

Strangely, KPIs five and six show that there is an expectation that employers should be more satisfied with the WCB than workers should be.

There is no measure to look at violations of the regulations, so no accountability respecting safety improvements in workplaces.

The WCB leadership and governance must visibly reflect a worker-centric culture. USW recommends a review of Workers Compensation Board measures of success, adjusting them to focus on safer workplaces and better outcomes for injured workers.

Your consideration of our concerns expressed in this document and in the public hearing process is greatly appreciated. United Steelworkers across BC look forward to your final report, and to positive change that we hope it can bring to our compensation system.

Respectfully submitted on behalf of United Steelworkers, District 3

Summary of Recommendations

1. RSCM Vol II Policy #98.00 should be amended to direct the Board to conduct a thorough review of all evidence provided and required to initiate a claim, to ensure that it is complete enough to allow for a reasonable adjudication, if there is any question regarding acceptance of the claim. In addition, the adjudicator should be directed to consider whether the claim is for a new injury or a re-opening, for an injury or an occupational disease so that all possibilities are correctly examined at the beginning of the claim.

2. USW recommends that injured workers be compensated for all of their earnings loss, not just for a portion, and not for a reduction from the whole. Restoring the balance of full compensation for waiving of legal rights is absolutely critical to restoring a just compensation system.

3. The Board should rely on the medical information provided by the worker's treating physicians, and should seek clinical opinions from the treating physicians when further information is required on a claim.

4. A form of Medical Review Panel should be re-instituted, so that when there is a medical issue that requires expert adjudication, it can be dealt with by qualified practitioners.

5. The duty to accommodate a disabled worker is clear in human rights law, and since the Board's role is to aid in getting injured workers back to work, the Board should be able to enforce the obligation. USW supports a change in legislation and policy to give the Board the appropriate tools to ensure employers uphold their legal responsibility to accommodate.

6. A person who has been in the workforce for a significant portion of their life will often define themselves by the work that they do; the loss of the work is also a loss of their sense of self, of their dignity. The compensation system needs to take this loss into consideration in order to best determine any program that will help the worker return to meaningful employment.

7. The focus of rehabilitation needs to shift to making the worker whole as much as possible, and this means that primary consideration must be given to how to enable a worker to return

to their pre-injury state, in terms of health, dignity and employment.

8. Workers should have full rights of appeal to challenge decisions made regarding vocational rehabilitation services provided or withheld.

9. USW takes the position that disability and culpability do not cease at retirement, and that workers who are disabled or killed due to workplace exposures are entitled to monetary compensation to reflect the effects of that disability on their lives.

10. While it would be preferable to have a system that workers could navigate on their own, USW recommends that at this time there be an increase in the funding provided for the Workers Advisers, so that they can participate fully as worker representatives, including writing submissions, obtaining evidence, and attending oral hearings to represent workers.

11. The WCB leadership and governance must visibly reflect a worker-centric culture. USW recommends a review of Workers Compensation Board measures of success, adjusting them to focus on safer workplaces and better outcomes for injured workers.