

JULY 19, 2019

I. Introduction

The BC Government and Service Employees' Union (BCGEU) represents over 79,000 workers in more than 550 bargaining units throughout British Columbia. Our diverse membership includes direct government employees who protect children and families, provide income assistance to vulnerable individuals, fight forest fires, protect the environment, manage our natural resources, deliver care to people with mental health issues and addictions, administer B.C.'s public system of liquor control, licensing and distribution, staff correctional facilities and the courts, and provide technical, administrative and clerical services.

Our membership also comprises workers throughout the broader public and private sectors where members provide clinical care and home support services for seniors; a diverse range of community social services; highway and bridge maintenance, post-secondary instruction and administration, as well as other non-governmental industries, including financial services, hospitality, retail and gaming.

Every day, BCGEU members are on the frontlines of service delivery, in jobs that put them at a high risk of physical and psychological injury. They are some of the most vital but most vulnerable workers in B.C. Since its inception, the BCGEU has been active in occupational health and safety, tirelessly working to improve workplace safety for our members. And, because the BCGEU provides support for members pursuing WCB appeals, we have decades of experience advocating for our members within the compensation system. As such, our union is uniquely positioned to contribute to this review.

II. B.C.'s workers' compensation system

B.C.'s workers' compensation system arose more than a century ago out of a historic compromise between workers' interests and employers' interests.

Workers gave up the right to sue their employers for a workplace injury, while employers agreed to fund a guaranteed no fault compensation system. The foundations of the system were the compensation and rehabilitation of injured workers regardless of fault, and the prevention of workplace injuries. Essentially, it was a social contract, enacted in legislation and administered by a board, which offered significant benefits for both workers and employers. While both workers and employers "benefit" from the creation of the system, it is not an insurance scheme to dispense mutually contracted "benefits"; it is social legislation based in equity and intended to provide compensation for injury, occupational disease, or death caused by employment.

However, since the B.C. Liberal government enacted sweeping changes in 2002, the system has been seriously undermined. The corporate rebranding from Workers' Compensation Board to WorkSafeBC signaled more than a simple name change. It signaled a shift away from compensating injured workers to imposing an onus upon workers to "work safe." With reduction of the financial impact to employers prioritized, there has been an overall reduction in compensation for injured workers, a more limited ability to appeal decisions, and a reduced focus on the merits and justice of an individual worker's case. The shift to focus primarily on the bottom line and away from providing equitable compensation to injured workers has eroded compensation payable, and has subjected injured workers to impersonal and disrespectful consideration by the very system meant to support and assist them.

Since 2002, the shift to focus on reducing costs has meant that workers have increasingly had to pay for workplace injuries—both financially, and in human terms. This situation violates the 'historic compromise' that is the basis of our workers' compensation system. Over the past 15 years, employers have enjoyed approximately 17 per cent reduction in average WCB assessments,¹ and the WCB now has a "surplus"

¹ Association of Workers' Compensation Boards of Canada, *Average Assessment Rates per \$100 Payroll 1985-2016 and Provisional Average Assessment Rates 2015-2019*. Available at: http://awcbc.org/?page_id=73#Rates

of several billion dollars.² Over the same period, compensation for workers has declined by an estimated 13 per cent.³

As workers are left behind by the system, the costs of workplace injuries have also been increasingly passed on to our public health care system and our systems of social assistance. This means these costs are borne by the general public, rather than by the compensation system that was established to cover them.

It is critical to acknowledge that the problems in our current system are the result of legislative and policy changes that have shifted the priorities and the culture of the Workers' Compensation Board away from its original foundations. Frontline workers employed by the Board are not to blame. Indeed, many injured BCGEU members report being well-served by frontline WCB staff that are members of the Compensation Employees' Union (CEU), and by the staff at Workers' Compensation Appeal Tribunal (WCAT), who are BCGEU members. However, there is a pressing need for the Board to invest in its staff, and to restore discretionary power to Board officers. Ensuring that frontline staff are well-trained and supported, have manageable workloads, and are able to make decisions that suit the circumstances of each case, is, in our view, a central part of repairing the current workers' compensation system.

Overall, changes to re-establish the balance between workers' and employers' interests are urgently needed. Today's compensation system is focused on minimizing costs, rather than properly and fairly compensating injured workers. The remainder of our submission is organized around the review's terms of reference. Grounded in the experiences of BCGEU members, we outline our concerns with the current system, and make recommendations for change. Our recommendations point the way towards achieving a fair, worker-centred

system that fully compensates injured workers, effectively supports their rehabilitation, is accessible and easily understood, and ensures workers are treated with compassion, respect and dignity.

III. Merits and justice - a fundamental, overarching principle

We begin with the need to refocus the Board on decision-making that is respectful and compassionate to injured workers. Making decisions based on the merits and justice of each case is a longstanding principle within our system which was seriously undermined by the changes made by the B.C. Liberals in 2002. It is a key, overarching issue that must be addressed if a worker-centred system is to be realized.

Recommendation: Amend subsection 99(2) of the *Workers' Compensation Act* to re-establish a clear requirement for Board decision-making to be based on the merits and justice of the case and be guided by, rather than bound by, the applicable Board policies.

Section 99 of the *Workers' Compensation Act* outlines the fundamental principles for Board decision-making, and subsection 99(2) requires that "the Board must make its decision based upon the merits and justice" of the case. As Paul Petrie wrote in his policy review last year, subsection 99(2) of the *Workers' Compensation Act* is a "pivotal provision" for moving towards a worker-centred approach, as it directs the Board to make its decision on the merits and justice of each worker's case, rather than the rigid or mechanical application of policy.⁴

However, in 2002, this subsection was amended, and the phrase "but in so doing the Board must apply a policy of the board of directors that is applicable in that case" was added. This phrase elevated Board policy, giving it binding status and allowing for subsequent policy choices that significantly, and almost completely, constrained Board decision-makers from exercising discretion based on the merits and justice of an

² WorkSafeBC, *2018 Annual Report and 2019-21 Service Plan*. WCB's "funded position," is detailed on p.76. It includes \$3.6 billion in reserves and a \$2.8 billion "unappropriated balance", for a total of \$6.4 billion.

³ Stan Guenther, Janet Patterson & Sarah O'Leary (2009). *Adding Insult to Injury: Changes to the BC Workers' Compensation System 2002-2008 – The Impact on Injured Workers*.

⁴ Paul Petrie (March 2018) *Restoring the Balance: A worker-centred approach to workers' compensation policy*.

individual worker’s circumstances. Over the past 15 years, the rigid application of policy has come to permeate the culture and practices of the WCB. As the BC Federation of Labour’s recent submission to the Board on this matter noted, the Board has embraced a decision-making culture “primarily of applying rule-based policy without discretion.”⁵

Unfortunately, this approach to decision-making has had devastating consequences for the lives of many injured workers in B.C., including BCGEU members. In Paul Petrie’s words, the failure to fully consider the merits and justice of each case “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.”⁶ Further, this approach has eroded the basic principles of equity and fairness upon which the system was supposed to be based.

Re-establishing merit-based decision making within our workers’ compensation system is critical to effectively address all of the items in the terms of reference for this review. It is, as Petrie wrote last year, “at the heart of a worker-centred approach.”⁷

In his report, Petrie’s first recommendation was to amend policy to explicitly incorporate the requirement in subsection 99(2) of the *Act* to decide based on the merits and the justice of the case. The Board of Directors accepted this recommendation, and recently conducted a public consultation on revised Board policy related to the merits and justice issue.

In the strongest terms, we submit that revising policy is not enough. Creating a workers’ compensation system that is truly worker-centred requires legislation that clearly directs the Board to apply policy in a way that is fair, compassionate and responsive to the worker’s circumstances. The unfettered principle of merits and justice, established in our system over 100 years ago,

5 BC Federation of Labour (March 2019), *Merits and Justice in Decision-Making: Submission to the Workers’ Compensation Board*, p.16.

6 Petrie, *Restoring the Balance*, p.13.

7 Petrie, *Restoring the Balance*, p.12.

must be restored. Subsection 99(2) must be amended to remove the requirement that Board policy be applied in decision-making.

IV. Supporting injured workers to return to work

The first item on Ms. Patterson’s terms of reference is to assess the policies and practices used in the workers’ compensation system relating to supporting injured workers to return to work. Certainly, supporting workers to recover from an injury and return to work is part of the core purpose of B.C.’s workers’ compensation system. Here, we have identified a number of areas where change is needed.

Recommendation: Ensure supports for workers to recover and return to work are high quality, accessible, flexible, and adaptable to the needs of workers.

The current system of providing care for injured workers follows a rigid, one-size-fits-all, cookie-cutter approach. After being hurt at work, in many instances our members have received delayed care, limited treatments, and/or care that ended before they were fully recovered. Our advocates are regularly called upon to assist workers that need a few additional physiotherapy or counselling sessions, but have been refused by the Board because of arbitrary limits on access to treatments.

One example of the pressing need for timely and appropriate care is among BCGEU corrections officers. These workers face unacceptable and increasing levels of violence in their workplace, and are being psychologically injured at high rates. Currently, they have access to a patchwork of psychological services that are general, limited in scope, and sometimes only available online. The result is that psychological injuries are often not addressed effectively early on, and instead progress to the point where they become debilitating for the worker, and expensive for both the employer and the Board.

Just as we have come to expect that workers will receive immediate and effective medical care for

physical injuries of all types, the same should be true for psychological injuries. The provision of immediate access to specialized care for workers whose mental health is negatively affected by their work would allow these injuries to be treated quickly and appropriately, and minimize the impact on workers, the employer, and the Board. Corrections is just one example from BCGEU's membership where workers are in need of quicker and better care for psychological injuries. Social workers, probation officers, and community health workers dealing with the opioid crisis, among many others, are similarly vulnerable to injuries to their mental health.

Our members are also regularly referred to contracted health care providers where they report that service quality is uneven. In our view, the Board does not adequately monitor and evaluate the quality and effectiveness of the programs of these health care providers, which can leave injured workers with inadequate or inappropriate care.

Overall, significant changes to the Board's approach are needed to ensure that injured workers are provided with high quality, individualized and properly supervised care. One model to consider is Ontario's Occupational Health Clinics for Ontario Workers (OHCOW). Funded through Ontario's Ministry of Labour, these clinics offer a worker-centred, community based approach to medical evaluation and treatment for injured workers. They are staffed by interdisciplinary teams, and their mission is to protect workers from injury and occupational disease. This approach stands in contrast to B.C.'s extensive use of contracted private health care providers like CBI Health Group, a Canada-wide corporation owned by a private equity firm and aimed at generating returns for investors.

Finally, workers and their treating physicians have limited choice and agency in decisions about their care. And, they have little recourse when the care they receive is inappropriate or poor quality. Changes are needed to allow for the meaningful involvement of an injured worker and their physician in the establishment and continuation of care and/or treatments. There is a tension between Board medical advisors and treating physicians that must be addressed.

Better facilitating the exchange of good information and analysis between treating physicians and the Board is part of the solution. Implementing an expedited appeal process to deal with concerns related to the quality and appropriateness of care could also be considered as a way to deal with these issues in a timely fashion.

Recommendation: Reestablish meaningful vocational rehabilitation for injured workers.

Following the 2002 changes implemented by the B.C. Liberals, vocational rehabilitation for injured workers was virtually eliminated. Between 2002 and 2005, the Board's budget for vocational rehabilitation was reduced by 98 per cent from \$130 million annually to just \$3 million.⁸ In the intervening years, Board spending on vocational rehabilitation has rebounded, but is still well below 2002 levels. In 2018, the Board spent just over \$100 million on vocational rehabilitation. After adjusting for inflation, this amount is still 40 per cent below 2002 spending levels.⁹

Injured workers deserve early access to meaningful, professional vocational rehabilitation. The provision of supports for injured workers to get back to work or move into a new job should not be a discretionary matter for the Board. Rather, the *Workers Compensation Act* (Section 16) should be amended to expressly guarantee a worker's right to meaningful vocational rehabilitation assistance.

Secondly, workers deserve a say in the process. Vocational rehabilitation plans should require meaningful involvement by the injured worker, and be flexible to adapt to changing circumstances. Plans should also be fully appealable through an expedited appeal process, to allow workers the opportunity to challenge Board decisions in this area.

In addition, the amount of resources allocated to individual workers for their vocational rehabilitation needs to be flexible and more responsive to the actual

8 Stan Guenther, Janet Patterson & Sarah O'Leary (2009). *Adding Insult to Injury: Changes to the BC Workers' Compensation System 2002-2008 – The Impact on Injured Workers*.

9 WorkSafeBC 2018 Annual Report and 2019-2021 Service Plan

needs of the worker. And, the wage rate set on the claim should not be the sole, or even the primary determining factor in setting the budget for vocational rehabilitation.

Another issue is that the Board could work more effectively with employers to return injured workers to their pre-injury employer where possible. Thousands of BCGEU members work for large employers that operate sophisticated disability management programs. Yet the interaction between the Board and these programs is often limited to trying to pass off costs and responsibility. Instead, vocational consultants could work more cooperatively and proactively with employer programs to benefit both the worker and the employer, and to achieve a better, more durable outcome for both.

Recommendation: Strengthen the Board’s role in ensuring injured workers are re-employed and/or appropriately accommodated by their existing employer.

In our present system, when an employer declines to re-employ an injured worker, the Board does little in response. Consequently, many workers that might have been accommodated in their previous position or placed in a different position with their pre-injury employer are left to search for work elsewhere. A few pursue a grievance or a human rights complaint, which can take months or even years to achieve a resolution.

The Board must do more to remind employers of their duty to accommodate. And, when an employer declines to re-employ an injured worker, the Board must push harder as to whether the employer’s decision actually meets the test of undue hardship. Strengthening the role of the Board in this area may involve writing a re-employment obligation into the *Workers’ Compensation Act*, similar to what already exists in Alberta, Ontario, and other Canadian jurisdictions.

However, the Workers’ Compensation Board should not become the final arbiter of the employer’s duty to accommodate injured workers. Through our collective agreements, the BCGEU has resolved countless complaints related to the appropriate accommodation of injured workers. Similarly, many BCGEU members have successfully pursued complaints through the BC

Human Rights Tribunal. In contrast, the Board does not currently have the expertise to effectively manage accommodation issues. As such, it would be not in the best interest of injured workers for them to become “trapped” under the sole jurisdiction of the Board in these matters.

The recent Caron decision confirmed that an injured worker’s rights and entitlements within a workers’ compensation system should be interpreted and implemented in accordance with the employer’s duty to accommodate.¹⁰ This is ultimately what the BCGEU wants for British Columbia’s workers, but without the Board being the final arbiter when disputes arise. We urge Ms. Patterson to make a recommendation in this matter that will enhance the Board’s role in supporting employers to meet their duty to accommodate injured workers, while also addressing the concerns we have raised above.

Paul Petrie’s report already suggests ways in which an employer’s claim costs might be relieved through successfully accommodating and continuing to employ an injured worker. The Board has legislated authority to levy assessments against an employer. It already has created an experience rating system (ERA) whereby employers may be charged more, or less, than the base amount depending on this rating. Multiple factors are included when determining an employer’s ERA. It is feasible that an employer’s genuine, good faith effort to re-employ an injured worker, up to the Board’s policy equivalent of undue hardship, without actually citing the test applied in labour and human rights actions, could also be a factor included in that determination. Failure by an employer to make a genuine effort to accommodate an injured worker’s disability would significantly affect the employer’s ERA in a negative way, while making a genuine effort to provide that accommodation would significantly affect the employer’s ERA in a positive way. Thus, an employer would benefit financially from accommodating an injured worker and the injured worker would benefit by remaining employed.

¹⁰ *CNESST v. Caron*, 2018 SCC 3

Recommendation: Improve prevention efforts, including adopting stronger regulations.

In discussing how to better support the return to work process for injured workers, we cannot avoid talking about the importance of prevention. Prevention matters because supporting an injured worker's return to work requires the conditions that caused their injury be remedied. Too often, after recovering from an injury, our members return to workplaces where the conditions that caused their injury are largely unchanged.

First, we see many activity-related soft tissue disorders (ASTDs, also known as musculoskeletal injuries or MSIs) among our membership. Healthcare workers, community social service workers, childcare workers, and our administrative services members are especially vulnerable to these types of injuries, but they are also endemic across our membership and the workforce more broadly. In fact, in 2017 ergonomic-related claims made up just over half of all initial claims to WCB, 31 per cent of time loss claims, and 21 per cent of total claims costs.¹¹

While the existing regulation related to ergonomics is relatively strong, the Board puts startlingly few resources into monitoring and enforcing employers' obligations to protect workers from MSIs. It currently employs a handful of ergonomists (<5) to serve 245,000 employers and 2.4 million workers. In each of the past five years, ergonomic issues were cited in about 275 of the Board's approximately 35,000 workplace inspection reports.¹² Despite thousands of workers being injured in this way every year, and despite musculoskeletal injuries accounting for fully one fifth of total claims costs, the factors contributing to these injuries are addressed in less than 0.01 per cent of the Board's workplace inspections each year. Fixing the conditions that contribute to overuse and repetitive strain injuries among workers is clearly not a priority for the Board at this time.

11 WorkSafeBC, *WorkSafeBC's Approach to Musculoskeletal Injury (MSI) Prevention*. Document provided to BCGEU, February 2019.

12 WorkSafeBC, *WorkSafeBC's Approach to Musculoskeletal Injury (MSI) Prevention*. Document provided to BCGEU, February 2019.

Thus, the current reality is that after recovering from a work-related ASTD/MSI, workers will often return to the same working conditions, and face a significant risk of re-injury. There is a pressing need to refocus and significantly expand the Board's prevention efforts related to ergonomics, not only to prevent injury in the first place, but to support a durable, productive return to work for injured workers.

Similarly, we have many BCGEU members whose physical and mental health is damaged by their experience of violence, bullying and harassment in the workplace. Corrections officers, healthcare workers, probation officers, social workers, community living workers, and many other BCGEU members are exposed to unacceptable and increasing levels of violence in their workplaces. The statistics are clear that violence is on the rise in B.C. workplaces, and an increasing number of workers are being injured as a result. In the decade between 2009 and 2018, the number of accepted claims related to acts of violence increased from 1,287 to 2,292, up nearly 80 per cent. In addition, the overall injury rate for acts of violence increased by 50 per cent over the same time period, to 0.09 time loss claims per 100 workers in 2018 from 0.06 in 2009.¹³

The fact is that in our community corrections offices, social service agencies, jails, courthouses, and health care facilities, workers are being injured by violence, and then returning to workplaces where the problem is not only being allowed to continue, but to worsen. The recent experience of BCGEU members at the Forensic Psychiatric Hospital and in our provincial jails are particularly tragic examples where the failure to prevent workplace violence has meant BCGEU members have been repeatedly injured.

For many years the BCGEU has made it clear to the WCB and to government that the current laws and regulations around workplace violence, bullying and harassment, and their enforcement by the WCB are inadequate, and must be strengthened to better protect workers. Without rules that effectively address violence

13 WorkSafeBC Statistical Services, *Claims Statistics for Acts of Violence, 2009-2018*. Reported provided to the BCGEU by request, May 2019.

combined with aggressive enforcement, injured workers will continue to return to jobs where they face a significant likelihood of re-injury. This is neither acceptable nor good return-to-work practice.

Workers who return to accommodated employment are, unfortunately, also being bullied and harassed in the workplace. This significantly interferes with and deters successful and durable return to employment. Support and protection for these workers, including a recommendation for general training and awareness in the workplace concerning the accommodation process, should be included in the report.

V. Equity and WCB's policy and practices

The second task for this review is to conduct an evaluation of current WorkSafeBC policy and practices through a Gender-based Analysis Plus (GBA+) lens. Certainly, at the BCGEU we know that current WCB policy and practices can disadvantage some groups of workers, including women, new immigrants, EAL workers, Indigenous peoples, and workers with disabilities.

Recommendation: Improve equity by strengthening supports for workers to navigate the system, and ensure the system is flexible enough to accommodate all workers.

To begin, many BCGEU members have limited comprehension of English, and as a result have difficulty understanding the system, including the correspondence they receive from WCB. We are aware of instances where our members missed deadlines or failed to provide information because they did not understand what was required or what they are entitled to, and then had their claims dismissed as a result. Workers like these are among the most vulnerable in the system, and the Board must strengthen supports for workers that are new immigrants, have limited English, and/or low education levels. The system also needs to be flexible enough to recognize and accommodate situations where workers have difficulty navigating the system.

Recommendation: Ensure workers of all ages receive fair compensation for work injuries.

Young workers can be disadvantaged by the current system of determining benefits. For example, in response to this review, a BCGEU member told us that her 16 year-old daughter experienced a serious knee injury at work. Her daughter's injury will have a lifelong impact on her ability to work, particularly because she was hoping to become a mountain guide someday. However, the Board did not compensate her based on a fair estimation of the impacts on her long-term career prospects. Rather, she was compensated based on the part-time, minimum wage job she held when she was injured. The system clearly did not take into account that she was a young person not yet started on a full-time career, when it should have.

Recommendation: Make changes to improve the assessment and adjudication of ASTDs.

Earlier in our submission, we noted that BCGEU administrative services workers, community social services workers, childcare workers and healthcare workers are particularly vulnerable to developing ASTDs. These groups of workers are also mostly women, and are often people of colour. Overuse and repetitive strain injuries often do not have a specific 'moment' of injury. Instead, they develop over time and their cause seems less clear. Currently, ASTDs represent more than half of all initial claims to WCB, but a significant proportion are denied, leaving workers without compensation and clogging up the review and appeals systems.

Petrie's report and the recent submission to the WCB by the BC Federation of Labour on the assessment and adjudication of ASTDs point to the need for major changes in how the WCB recognizes and compensates ASTDs.¹⁴ Both reports point out that the application of the merits and justice principle in the adjudication of ASTDs is of utmost importance. The Board urgently needs to update outdated policy, guidelines and practice directives that are presently based on American research from the 1990s. Changes to allow these injuries to be adjudicated as both a personal

¹⁴ BC Federation of Labour (May 2019), WCB Submission: Activity Related Soft Tissue Disorders of the Limbs Policy.

injury and occupational disease, and to ensure all relevant risk factors that may have contributed to the injury are considered are in order. In sum, we echo the recommendations of these two reports on WCB's management of ASTDs.

Recommendation: Improve equity through stronger regulation and fairer compensation rules.

We know that some workers, including workers of colour and LGBTQ workers are more vulnerable to violence, bullying and harassment at work. We have already noted that the current regulation and Board policies on preventing violence, bullying and harassment and their enforcement are not adequate, and must be strengthened to effectively protect workers. Also, in the *Workers' Compensation Act* and the accompanying Board policies, the provisions for the compensation of mental disorders caused by workplace bullying are very limited. This is another way that some of B.C.'s most vulnerable workers are disproportionately disadvantaged within the current system.

VI. Modernizing WorkSafeBC's culture to reflect a worker-centric service delivery model.

Culture can be generally understood as an organization's beliefs, values and attitudes, and how these influence the behaviour of its employees. Organizational culture is shaped by many factors, including the organization's goals, management behaviour, rules and policies, organizational structure, communications, and social norms.

As Paul Petrie pointed out last spring, the changes enacted in 2002 focused the WCB on cost savings. In the years since, the Board has developed a "policy-driven case management system" that is designed to provide "average justice," rather than consider the circumstances of individual workers.¹⁵ A rule-bound culture has been established which values efficiency and cost control over common sense and the well-being of injured workers.

¹⁵ Paul Petrie (March 2018) *Restoring the Balance: A worker-centred approach to workers' compensation policy*, p.9.

Below, we outline a number of issues related to WCB's culture, and provide recommendations to support re-orienting WCB's culture to reflect a worker-centric delivery model.

Recommendation: Increase worker representation on the WCB's Board of Directors.

Currently, there is only one worker representative on the WCB's Board of Directors. Two decades ago, the board was balanced between workers and employers, the key stakeholders in the system.

Without significant worker representation at the highest level of decision-making at the Board over the last 20 years, we have seen the policies, practices and culture of WCB move away from a worker-centred approach. The current state with just one worker representative on the ten-member Board of Directors does not demonstrate that workers' place in the compensation system is valued or effective.

Going forward, it is clear that a workers' compensation system cannot be "worker-centred" if it is not overseen in a significant way by workers. Changes need to be made to restore significant worker representation on the WCB's Board of Directors. The Board of Directors should return to a structure where the majority of members are made up of worker and employer representatives. Fundamentally, the system belongs to workers and employers, and the makeup of the Board of Directors must reflect that.

Recommendation: Take steps to ensure the respectful treatment of workers.

Worker-centred service delivery must ensure the respectful treatment of injured workers at all steps in the claim process. Achieving this begins with making the legislative, policy and leadership changes to begin the shift to a worker-centred culture at the WCB. These broader systemic changes are necessary to ensure that the interactions between frontline staff and injured workers are respectful and supportive.

Practically, it also requires that WCB staff have the time and capacity to answer workers' questions and return their phone calls in a timely fashion.

Our advocates regularly hear from injured members who are unable to contact their case managers. Voice messages go unreturned, and questions go unanswered. We have also heard that some staff have been rude and appeared insensitive when speaking with injured members.

As we have already pointed out, there is a pressing need to invest to improve the working conditions, training, and decision-making power for WCB staff so they are empowered to effectively and sensitively respond to the needs of injured workers.

It may be worthwhile to consider adopting a “code of rights,” as Alberta’s Workers’ Compensation Board did in 2018.¹⁶ In addition to legislative and policy change, this kind of a document could serve to articulate a deep, genuine commitment to serving injured workers with dignity and respect, and focus the organization on moving towards a renewed, worker-centred way of operating.

Recommendation: Ensure processes are clear and understandable, and provide more independent support for injured workers to understand and navigate the system.

The reality is that our compensation system has become significantly more complex and difficult for many workers to understand, let alone navigate effectively, making appeals and gathering medical information daunting and sometimes expensive tasks for an injured worker. Our advocates routinely find that workers do not understand correspondence they receive from the Board. We receive regular calls from workers needing support to interpret what a letter from the Board means and whether they need to respond. As a large and sophisticated workers’ organization, the BCGEU is able to assist our members to understand correspondence and to represent them in WCB appeals.

A majority of workers in B.C., however, either do not have union representation or their union does not have

the resources to assist them in these matters. Today, the Workers’ Advisers Office provides some support to injured workers, but it is overwhelmed by requests for assistance, and has a limited mandate.

Worker-centred service delivery means that the Board must put more effort and resources towards ensuring that WCB processes are clear and understandable. Adopting strategies like providing correspondence in plain language wherever possible can make a significant difference. As well, significantly more funding and a broader mandate are needed for the Workers’ Advisers office to better support all injured workers.

Recommendation: Improve the appeal process, including full reconsideration power for the Workers’ Compensation Appeal Tribunal.

The discretion to depart from Board policy when appropriate must be extended also to WCAT, such that the appeal tribunal will be guided by, not bound by, Board policy. Section 251 of the *Act* should be struck in its entirety.

Section 256 of the *Act* should be amended to enable WCAT to reconsider a decision on common law grounds, as it had been doing prior to the decision of the British Columbia Court of Appeal,¹⁷ later confirmed by the Supreme Court of Canada,¹⁸ in *Fraser Health*. This is beneficial both to workers and employers because WCAT, historically, has satisfactorily and economically resolved most reconsideration matters, thus relieving workers and employers from the expense and stress of pursuing judicial review. As was the case prior to *Fraser Health*, the proposed amendment to Section 256 judicial review would continue to enable those unsatisfied with the outcome of the reconsideration by WCAT to seek judicial review.

Section 239(2)(b) and (d) of the *Act* should be struck, and appeals of decisions on matters concerning vocational rehabilitation under Section 16 of the *Act*, and pension commutation requests, should be heard by WCAT.

16 WCB Alberta, *Code of Rights and Conduct*. Available at: https://www.wcb.ab.ca/assets/pdfs/public/policy/manual/printable_pdfs/code_rights_conduct.pdf

17 2014 BCCA 499

18 2016 SCC 25

An expedited appeals process should be made available for those who wish to access it, both at the Review Division and WCAT levels. This will enable injured workers to obtain decisions more quickly and allow them speedier access to the compensation to which they are entitled, or alternatively provide the fastest opportunity to conclude the matter and move on. This would be particularly useful in matters involving medical disputes.

The current system where Board medical advisors are provided information from case managers and are often solely relied upon in WCB's adjudication processes is not working, and often appears to reflect significant institutional bias. Medical opinions from Board medical advisors are being delivered in terms of Board policy restrictions, particularly in cases of ASTD claims.

A legislated provision to create an expedited independent medical review process that is accessible to workers and is not solely at the discretion of WCAT would be a positive and effective step in producing timely appeal decisions and more efficient and fair in settling medical disputes. While having a mandate similar to that of the former medical review panels, the expedited independent medical review process would seek to fast track the resolution of medical disputes on a claim and provide a binding medical opinion, which would then be used to adjudicate entitlement to compensation.

VII. Improved case management of injured workers

The next item on the terms of reference for this review is for Ms. Patterson to make recommendations dealing with issues related to the improved case management of injured workers. Based on the experience of our members and our advocates, we have several recommendations to support improved case management.

Recommendation: Build capacity and commit to building consistent, productive relationships between case managers and workers.

BCGEU members injured at work often report being bounced from one case manager to another as their claim proceeds through the system. We also hear frequently that workers are unable to contact their case managers. As well, many workers face long waits for decisions to be made.

To improve case management, the Board needs to build its capacity, provide greater consistency of case managers, and ensure that all issues are adjudicated in a timely manner. These improvements will likely require increased staffing levels, as well as additional training and granting staff greater ability to exercise discretion.

It is important to acknowledge that sometimes the relationship between a case manager and an injured worker is not a good fit. Thus, it is our view that workers should have the ability to request a different case manager when the relationship is just not working.

Recommendation: Make adjustments to ensure case management is fair, values the evidence of workers, and is focused on recovery.

In our experience at the BCGEU, we have found that some case managers refuse to make decisions, or to proceed with adjudication of entitlement because some aspect of the claim is in the appeal system. There is no provision in the *Act* that requires adjudication to stop simply because some matter concerning the claim is in the appeal process.

Another issue is that an adjudicator does only part of the job. If a claim can be considered either as a personal injury under Section 5 of the *Act*, or an occupational disease under section 6, many of our members have been receiving a decision adjudicating only one of those sections, instead of both in the alternative. Adjudication under both Sections 5 and 6 should be conducted where it is possible that the claim could be treated as an application for compensation for personal injury, or for occupational disease. Claims involving ASTD diagnoses are particularly affected by this.

In response to this review, a number of BCGEU members told us they had submitted evidence related to their claim which was ignored or dismissed by the Board. Changes to case management must be made to allow the evidence of workers and their health care providers to be given proper consideration. In particular, a decision about permanent disability by a Board officer must consider evidence of the worker and their treating physician, and allow an opportunity for the worker to provide additional information or evidence in response to the report from an Occupational Rehabilitation Program or similar Board sponsored entity. We have received numerous accounts from members who have been in such programs, and who say the activity described in the reports sent to the Board bears little, if any, resemblance to what occurred when they were there.

Recommendation: Make significant improvements to the management and adjudication of mental disorder claims, including making needed legislative changes.

Workers with psychological injuries need to be treated with particular care and professionalism. These workers need assessments and decisions to be made as quickly as possible, and for extra supports to be provided for them to navigate the system.

The recent addition of presumptive legislation is a positive change that will greatly simplify and expedite adjudication of mental disorder injury claims under Section 5.1 of the *Act*. One change that could support better management of mental disorder claims is related to diagnosis. Before 2012, a doctor's diagnosis was acceptable for a mental disorder claim. Today, the Board requires a diagnosis be made by a psychologist or a psychiatrist. Returning to the pre-2012 approach could significantly expedite the system, allow workers to access care and compensation more quickly, and support a faster and more durable recovery.

Workers who have been injured physically sometimes develop psychological injuries as a result. This issue is not uncommon, and the Board needs to make changes to better support these workers. When a mental injury occurs as a consequence of a compensable physical injury, the adjudication could be expedited through an

immediate referral to the mental disorder injury unit, where a speedy referral for a psychological assessment, along with recommendations for treatment, can be arranged and ordered.

The issue of workers being psychologically injured by their experience within the compensation system must also be acknowledged. Frequently, psychologists in their assessment reports list the worker's experience in dealing with persons at the Board, and/or the financial hardship they endure when adjudication or other claims processes are stalled or interrupted, as a cause of the worker's mental disorder. It is our view that these instances should be adjudicated as compensable consequences of a worker's injuries. There are real and intense stresses placed on injured workers as they move through the claims process, which can result in psychological injury. A negative and even debilitating psychological reaction is easily foreseeable, and, given the provisions of Section 10 of the *Act*, is readily identified as having been significantly caused by the work injury or occupational disease.

The requirement under the subsection S.5.1.1 (a)(ii) of the *Workers' Compensation Act* that psychological injuries caused by significant work-related stressors, including bullying and harassment, are only compensable if they are "predominantly caused" by an individual's experiences at work is extremely problematic. This requirement subjects fragile workers to unnecessary and intrusive assessments that workers with physical injuries are not required to undergo. This language is clearly discriminatory on the basis of the nature of the disability. The *Act* should be amended so that "predominantly caused" is removed and the test is "significant cause," as is the case with all other work-related injuries compensated by the Board. To impose the higher threshold discriminates against disabled workers on the basis of their disability, which the Supreme Court of Canada in *Laseur and Martin*¹⁹ said was contrary to the Charter.

19 Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur, 2003 SCC 54, [2003] 2 SCR 504.

Finally, the so-called “labour relations exclusion” under Section 5.1.1(c) of the *Act* must be eliminated or substantially revised. This section says that mental disorders caused by the decision of an employer are not compensable. In our experience at the BCGEU, this exclusion has meant that workers that are genuinely injured by a disregard for their health and safety by their employer, or by purposeful bullying, often find they are not entitled to compensation.

In short, it is our view that the language under 5.1.1(c) is heavily skewed in favour of the employer, and means that workers can suffer serious psychological injuries at work without any access to compensation. As Petrie wrote in his report last spring, the employer controls virtually all aspects of the workplace. As such, if this language is interpreted too broadly, legitimate workplace injuries may go uncompensated.²⁰ Decisions of the employer concerning the employment ultimately lead to virtually everything that occurs in the employment. This language should be removed from the *Act*. Alternatively, it must be significantly revised, so that it is clear that not all consequences of decisions made by the employer are not automatically shielded and that workers will be properly compensated when psychological injury is caused in the workplace.

Recommendation: Stop using case managers in lieu of qualified Occupational Therapists or Ergonomists, to conduct risk assessments in the workplace.

Repetitive Strain injuries (ASTDs) are increasingly prevalent and have no sudden onset. Since they tend to develop gradually over time, it is more difficult to identify the cause. Consequently, it is important that the work activity be properly viewed and assessed by a qualified Occupational Therapist or Ergonomist who has been trained and granted qualification by an accredited educational institution. The Board is not an accredited educational institution and yet it employs case managers whom it has “trained” to conduct complex risk factor assessments in a variety of workplaces. Unsurprisingly, when the case manager reports to a Board medical advisor that they found no risk factors in the workplace, the Board medical advisor finds that the

employment was not likely to have caused the ASTD. Equally unsurprising, however, is that on a significant number of occasions when a qualified Occupational Therapist or Ergonomist conducts an assessment of the workplace for purposes of appeal, based on the same evidence from the worker, there are a number of significant risk factors identified as likely to cause the ASTD in question. The Board should invest in using qualified Occupational Therapists and Ergonomists to carry out the risk factor analysis and allow the case managers to consider the resultant evidence, not create it.

VIII. Steps to increase confidence of workers and employers in the workers’ compensation system

In the years since 2002, confidence in our workers’ compensation system has declined precipitously. Seeing the Board amass a large “surplus” and reduce employers’ assessments while injured workers experience unfairness and unnecessary suffering, has led many British Columbians to become deeply frustrated and disillusioned with the system. Restoring confidence in the system requires a significant and decisive shift in both legislation and many aspects of the Board’s operations. Below, we outline a number of key steps government and the Board can take to rebuild confidence in the system.

Recommendation: Ensure injured workers are fully and fairly compensated.

Since 2002, an array of changes have resulted in an overall reduction of compensation for injured workers. For example, previously based on 75 per cent of gross wages, the overall benefit rate was reduced to 90 per cent of net income. Changes to no longer fully index benefits to the CPI, and to eliminate the payment of interest on most retroactive benefits further reduced compensation levels for injured workers. Dropping the dual system, where compensation for a permanently disabled worker was granted based on the higher of a permanent functional impairment (PFI) pension and a loss of earnings (LOE) pension also resulted in reductions in the benefits paid to injured workers.

²⁰ Petrie, *Restoring the Balance*.

Further, PFI pensions that had been payable for life were ended at age 65.

In sum, these changes significantly shift the financial burden of workplace injuries onto workers. Current compensation levels and the systems for their determination are grossly unfair and entirely inconsistent with the 'historic compromise' that was supposed to offer workers full and proper compensation for the duration of their injury.

Full, fair compensation for injured workers must be restored. The overall benefit rate should be based on 100 per cent of net earnings, permanent functional impairment pensions should be paid for life, and benefits should be fully indexed to the CPI. The dual system as it formerly existed with a mandatory comparison of the value of permanent disability compensation payable under Section 23(1) and that payable under Section 23(3) should be reinstated. There should also be greater fairness and flexibility in the determination of wage rates to permit provision of payment that more fairly and accurately compensates for the worker's short term and long-term temporary disability loss, and long-term permanent disability loss, due to the injury.

Recommendation: Investigate and address the problem of claims suppression.

We have heard from our members that sometimes employers actively discourage employees from making injury claims. To restore trust and confidence in the system, the Board must demonstrate that it is proactive and firm in ensuring that all workplace injuries are reported and appropriately addressed.

To begin, we echo Petrie's recommendation that the Board should develop policy on how to respond to allegation of claim suppression. This is a serious violation of the WCA (177), and must be taken seriously by the Board. However, there is currently no clear policy direction in place for how Board officers should respond when an allegation of claim suppression is made.

Secondly, explicit non-discrimination language for workers who make claims should be added to the

Workers' Compensation Act. This protection is in place for workers exercising their rights and responsibilities under Part 3 (Occupational Health and Safety) of the *Act*, and should similarly be made explicit related to compensation so that workers that make claims can be more effectively protected from the many and various potential forms of discrimination or retribution by employers. Provisions similar to those set out in Section 253 of the *Act* should be enacted to direct the Board in how to act when responding to allegations of discrimination for filing a claim.

A review of the use of experience ratings, in context of claims suppression, is also in order. This issue was explored in the recent review of the workers' compensation system in Alberta. The review noted that although experience ratings are meant to provide a financial incentive for employers to improve health and safety, there is significant evidence that this tool is not effective in meeting this objective. Instead, there is evidence that this system can function as an incentive for claims suppression and for injured workers to not be properly accommodated. For employers, having fewer claims and a faster return to work means reduced premiums. This rate-setting process must be more closely examined, and reformed to better protect against claims suppression.

Addressing the broader systemic factors that likely discourage workers from making claims is also important. Poor treatment of workers, long delays and confusing processes can also serve to suppress legitimate claims. These issues must be better understood and addressed by the Board.

IX. How to manage the unappropriated balance in the Accident Fund

The final issue under review is how the Board's so-called "surplus" should be allocated. First, we say, that there is no "surplus"; rather, there remains an unallocated balance in the accident fund. We recommend that restoration of proper compensation for workers should be prioritized as a proper allocation of those funds.

Recommendation: Increase compensation for injured workers.

Board documents refer to its unallocated billions as an “unappropriated balance.” In truth, in light of the clawbacks and draconian legislative and policy measures implemented over the years dating from 2002, these funds belong to injured workers that have not been fully compensated after being injured at work. Along with suffering physical and/or psychological injuries, B.C. workers have been expected to suffer financially as well. As such, the priority should be to use these funds to restore proper and fair compensation for injured workers. Previously, we outlined key changes needed in terms of compensation levels. These changes should be implemented, and the “unappropriated” funds in the accident funds should be directed to fund those compensation levels.

Recommendation: Invest in enhanced services and supports for injured workers.

Throughout our submission, we have outlined changes needed to better care for and support injured workers. The “unappropriated balance” should also be used to fund these changes. They include quick access to high quality healthcare for injured workers, and access to timely, professional, high quality vocational rehabilitation where appropriate. Investments in staff are needed to ensure appropriate and timely processes throughout the life of a claim. More funding should be direct to provide support through the Workers’ Advisers office. As well, these monies could be used for the provision of financial support as workers wait for decisions on their claims.

Recommendation: Invest in prevention.

Our final priority for the use of the unappropriated balance in the accident funds is to invest in the prevention of workplace injuries. This includes more resources to monitor and enforce regulations. Additional support could be provided to joint health and safety committees and worker representatives to allow them to be more effective in their prevention role. Research, and the development of stronger regulations also make key contributions to improved health and safety in our workplaces. Rather than simply returning these funds to employers, investing in prevention will ultimately contribute to future cost savings and ensuring the system is financially viable over the long term. Regardless, this is a social contract to compensate injured workers—if the costs go up, employers have to pay more, the increased costs should not be taken out of the pockets of injured workers and their families.

X. Conclusion

In response to this review, nearly every BCGEU member that reached out to the union said they want to make sure that no one else has to go through what they have experienced within the current system. As our members’ stories to the review demonstrate, and as we have outlined above, significant changes are needed to repair the social contract that is our workers’ compensation system. On behalf of BCGEU members, we appreciate the opportunity to provide this submission.

