SUBMISSIONS OF THE COMMUNITY LEGAL ASSISTANCE SOCIETY REGARDING THE WORKERS' COMPENSATION REVIEW

1. Thank you for the opportunity to make submissions with respect to the review of the workers' compensation system.

ABOUT CLAS

2. CLAS is a non-profit law firm that was established in 1971. We provide legal assistance and work to advance the law to address the critical needs of those who are disadvantaged or face discrimination.

3. CLAS was the first community law office in BC. Our structure reflects nearly 50 years of partnership between the private bar and community groups to provide legal aid to people facing discrimination and marginalization. Since our inception, we have become a nationally recognized organization specializing in housing security, income security, workers' rights, mental health, and human rights law.

4. CLAS operates as an "umbrella" organization consisting of a number of programs and projects. We have assisted thousands of people through our service case work and have conducted hundreds of test and systemic cases at all levels of court, including the Supreme Court of Canada. We have been counsel on hundreds of reported decisions in the areas of law in which we practice.

5. CLAS's legal services with respect to workers' compensation focus primarily on judicial review and systemic challenges to law and policy. CLAS lawyers also sit on numerous WCB policy review committees, including the Policy and Practice Consultation Committee.

SUMMARY OF RECOMMENDATIONS

Compensation for Mental Conditions

a. Repeal section 5.1(1) of the *Workers' Compensation Act*, R.S.B.C. 1996, c. 492 (the "*WCA*"); and
b. Compensate mental conditions in the same manner as physical conditions.

Discrimination, human rights, and the duty to accommodate

c. Empower the Board to enforce the duty to accommodate while ensuring that workers can still access remedies through the provincial human rights system or under a collective agreement;
d. Give the Board and WCAT time and resources to ensure its staff are trained and ready to competently investigate and assess the duty to accommodate;
e. Provide resources, training, and support to the Workers' Advisors Office, the Employers' Advisors Office, and other party representatives to ensure advocates are properly trained with respect to human rights law and the duty to accommodate; and
f. Expand the discriminatory action provisions in ss. 150-153 of the *WCA* to cover all forms of claim suppression and retaliation against workers.

Board Decision Making

g. Restore the Board's power to reconsider decisions beyond 75 days;
h. Create a process for a holistic review of complicated claims;
i. Eliminate Board medical advisors; and
j. Eliminate the provisions in the *WCA* that make Board policy binding on all adjudicators.

The Appeal System

k. Restore the power of the Workers' Compensation Appeal Tribunal ("WCAT") to independently provide relief with respect to Board policy that conflicts with the *WCA;*

l. Restore WCAT's human rights and *Charter* jurisdiction; and
m. Restore WCAT's reconsideration powers.

Permanent Disability Awards

n. Eliminate the "so exceptional" requirement for loss of earnings ("LoE") awards;
o. Create a mechanism to review permanent functional impairment ("PFI") ratings to ensure they actually reflect lost earning capacity;
p. Eliminate the 2.5% PFI cap on chronic pain awards; and
q. Provide non-economic awards, especially in cases where a permanently disabled worker is not entitled to other financial compensation under the *WCA*.

Miscellaneous

r. Pay interest on retroactive benefit payments; and
s. Remove the "at or immediately before the date of the disablement" requirement for the schedule B presumption.

COMPENSATION FOR MENTAL CONDITIONS

Recommendations

- Repeal section 5.1(1) of the *WCA*; and
- Compensate mental conditions in the same manner as physical conditions.

6. An examination of inequality in the workers' compensation system must include a review of the current regime governing claims for mental conditions. Most workers' compensation systems were created at a time when workers, mostly male, were being physically injured in industrial accidents. As the 1999 Royal Commission noted:

> The injuries these reformers sought to eliminate or compensate were relatively easy to identify; they were acute and traumatic and appeared to be the product of discrete and observable incidents. This is no longer the case
>
> *For the Common Good, final report of the Royal Commission on Workers Compensation in British Columbia* (Vancouver: Queen's Printer, 1999) at p. 5 (the "1999 Royal Commission")

7. Mental health has been historically ignored by workers' compensation system. In *Plesner v. British Columbia Hydro and Power Authority*, 2009 BCCA 188 (*Plesner*), the BC Court of Appeal notes that the regime governing workers who claim for mental conditions cast them as:

> less deserving, less credible, and generally less worthy of compensation under the *Act* than workers suffering from physical injuries, or from mental injuries linked to physical injuries. The provisions are an affront to their human dignity and devalue them as human beings.

8. There was hope that *Plesner* would be a push towards equal treatment for workers claiming for mental conditions. At second reading of Bill 14, *Workers Compensation Amendment Act,* 4th Sess, 39th Parl, British Columbia, 2011, which ushered in the current version of s. 5.1(1) of the *WCA*, then Minister of Labour, Citizens' Services and Open Government Margaret MacDiarmid stated:

> Our government recognizes that we need to treat mental disorders that arise from the workplace in the same way as we treat physical disabilities, and that's why we're making these amendments."
>
> British Columbia, Legislative Assembly, Official Report of Debates (Hansard), 39th Parl, 4th Sess, Vol. 36, No. 6 (3 May 2012) at 1130 (Hon. M. MacDiarmid)

9. Sadly, this has simply not happened. Section 5.1(1) of the *WCA* and related Board policy create a number of restrictions that apply only to claims for mental disorder. These restrictions make it much more difficult for workers to obtain compensation for mental conditions when compared to workers claiming for physical conditions.

10. Workers claiming for mental disorders caused by significant workplace stressors, including bullying and harassment, must meet the higher "predominant cause" standard even though other workers, including those claiming for physically disabling conditions, receive compensation if work was merely of "causative significance", meaning more than a trivial or insignificant cause of the condition. In *Plesner,* the Court determined that applying an elevated causative standard to workers claiming for mental conditions was discriminatory under s. 15 of the *Charter*.

11. Workers claiming for mental conditions also require a classificatory label in the form of a diagnosis made by a psychiatrist or psychologist from the most recent edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (the "DSM") before compensation can be provided. There is no corresponding requirement for workers claiming for physically disabling conditions.

12. In *Saadati v. Moorhead*, [2017] 1 SCR 543, the Supreme Court of Canada noted that requiring a DSM label before compensation is paid for mental injuries raises equality concerns and rejected such an approach in the context of personal injury claims:

> [36] It follows that requiring claimants who allege one form of personal injury (mental) to prove that their condition meets the threshold of "recognizable psychiatric illness", while not imposing a corresponding requirement upon claimants alleging another form of personal injury (physical) to show that their condition carries a certain classificatory label, is inconsistent with prior statements of this Court, among others. It accords unequal — that is, less — protection to victims of mental injury. And it does so for no principled reason (Beever, at p. 410). I would not endorse it.

13. The need to secure a DSM diagnosis from a psychiatrist or psychologist may also impede access to critical early intervention health care services, particularly in rural areas. Even if the worker has access to a psychiatrist or psychologist, many DSM diagnoses require symptoms to be present for months before the diagnosis can be confirmed. In the meantime, the worker may be ineligible for health care or income continuity benefits.

14. The Board has commendably taken what steps it can through *Practice Directive #C3-3 (INTERIM) – Mental Disorder Claims* to issue preliminary decisions providing compensation before a diagnosis is confirmed. However, the fact that the Board must take special measures to circumvent this requirement reinforces just how unfair it is.

15. Workers also cannot be compensated for a mental disorder if it is caused by a decision of the worker's employer relating to the worker's employment (the "Employer Decision Exclusion"). There is no corresponding exclusion for workers claiming compensation for physically disabling conditions.

16. The Employer Decision Exclusion, which is currently being broadly interpreted, forces people with work-related mental disabilities to bear the financial consequences of employer decisions that create, or fail to remedy, a mentally or psychologically unsafe work environment. In contrast, workers who sustain a physical disability as a result of employer decisions that create, or fail to remedy, physical risks in the workplace will get coverage.

17. Finally, policy #13.00 of the RSCM II precludes claims for mental disorders caused by significant workplace stressors unless the stressors are excessive in intensity and/or duration from what is experienced in the normal pressures or tensions of a worker's employment. There is no corresponding exclusion for workers claiming compensation for other conditions, including physically disabling conditions that result from work that is normally physically intense or prolonged.

18. For example, a mover who suffers a back injury will not be denied compensation simply because heavy lifting is normally expected in the employment, whereas a social worker who develops a mental disorder after years of working with victims of abuse may well be denied compensation if the stress is considered to be an expected pressure and tension of the job.

19. The *WCA* should be amended to eliminate these barriers and simply provide compensation in the same manner and in the same circumstances that compensation is provided for physical conditions.

DISCRIMINATION, HUMAN RIGHTS, AND THE DUTY TO ACCOMMODATE

Recommendations:

a. Empower the Board to enforce the duty to accommodate while also ensuring that workers can still access remedies through the provincial human rights system or under a collective agreement;
b. Give the Board and WCAT time and resources to ensure its staff are trained and ready to competently investigate and assess the duty to accommodate;
c. Provide resources, training, and support to the Workers' Advisors Office, the Employers' Advisors Office, and other party representatives to ensure advocates are properly trained with respect to human rights law and the duty to accommodate; and

d. Expand the discriminatory action provisions in ss. 150-153 of the *WCA* to cover all forms of claim suppression and retaliation against workers.

Benefits of Empowering the Board to Enforce the Duty to Accommodate

20. BC is one of the very few jurisdictions left in Canada that does not contain an explicit duty in its workers' compensation legislation for employers to reemploy and accommodate workers in the return to work process. On the surface, this seems like a relatively straight forward amendment to promote vocational rehabilitation and safe return to work.

21. Embedding the duty to accommodate in the *WCA* has a number of advantages:

a. The Board can proactively enforce the worker's right to return to accommodated work, whereas other decision makers such as the Human Rights Tribunal can only provide compensation after the fact;
b. The worker will already be dealing with the Board, which may avoid the need for the worker to pursue legal proceedings in multiple venues;
c. The Board's decision making may be faster than the Human Rights Tribunal giving the worker quicker access to a remedy;
d. Many workers' compensation acts in other jurisdictions create presumptions that benefit workers, such as a presumption that if the worker is terminated within a prescribed period it was due to their disability;
e. The Board could be given remedial powers, including ordering reinstatement or levying fines, that are not available, or at least realistic, in many human rights proceedings;
f. The Board has a proactive, investigatory mandate, which may be preferable and easier for some workers who face barriers prosecuting a complaint in a traditional adversarial setting; and

g. Workers enjoy confidentiality in the workers' compensation system that may not be available in other proceedings, particularly in proceedings before the Human Rights Tribunal.

Concerns with Empowering the Board to Enforce the Duty to Accommodate

22. Despite the benefits, empowering the Board to adjudicate the duty to accommodate could also negatively affect workers if the power is not implemented thoughtfully and carefully. The Board's expertise is limited to work related disability. Yet many human rights complaints do not relate solely to a single ground of discrimination. Indeed, current human rights law emphasizes the importance of examining how multiple grounds of discrimination can intersect.

Radek v. Henderson Development (Canada) and Securiguard Services (No. 3), 2005 BCHRT 302 at paras. 463-465

23. The Board may understandably struggle with how to handle claims where the worker's disability intersects with other grounds of discrimination. For example, an employer's refusal to accommodate a worker's disability may be based in part on age or gender stereotypes. Even where disability is the only ground of discrimination, the Board will undoubtedly face claims where some portion of the necessary accommodations related to a non-compensable disability.

24. It would be highly problematic if the Board attempted to adjudicate the duty to accommodate based solely on the worker's compensable disability without any consideration of the worker's other circumstances. Not only would this be totally inconsistent with current human rights law, it could leave the worker without any comprehensive assessment of the duty to accomodate if other decision-makers who can consider the issues holistically refuse to entertain a complaint because the Board has already rendered a decision, albeit a marginal one, on the issues.

British Columbia (Workers' Compensation Board) v. Figliola, [2011] 3 SCR 422

25. However, assessing all aspects of a work-related human rights complaint will require the Board to go beyond its traditional expertise. If the Board does indeed move into this new territory, it will need time and resources to recruit and train adjudicators to ensure the duty to accommodate is properly and competently addressed. Although the Board currently has human rights jurisdiction, it is not a common aspect of its decision making. Indeed, the Board does not currently adjudicate the duty to accommodate at all.

26. Similarly, advocates assisting injured workers, such as the Workers' Advisors Office and union representatives, likely have little expertise or experience with respect human rights complaints or the duty to accommodate. They too will require resources and training to properly represent injured workers.

Ensuring Workers Still Have Access To Other Human Rights Adjudicators

27. Despite the benefits of empowering the Board to enforce the duty to accommodate as part of its mandate to promote safe return to work, its jurisdiction to do so should not oust the jurisdiction of other human rights adjudicators. There will be many cases involving the duty to accommodate that are more properly adjudicated in another forums because of the nature or complexity of the issues or the remedies that are being sought.

28. While the remedial powers embedded in workers' compensation legislation could be broader in some respects than those in human rights legislation, in other respects they may be more limited. For example, we are not aware of any workers' compensation board in Canada that is empowered to award the worker compensation for injury to dignity, feelings, or self-respect. Workers should not lose all access to the remedies available in other forums as a result of the Board's expanded jurisdiction. Nor should the Board be the final word on a worker's human rights, particularly in complex cases.

29. An ideal system would allow the various human rights adjudicators to each do what it does best. The Board would have the power to intervene quickly and proactively in an effort to return the worker to productive work, while the Human Rights Tribunal and labour arbitrators would retain jurisdiction to review complaints and provide a remedy after the fact in cases where the worker was not properly accommodated. Admittedly, this is difficult to implement in practice.

30. The simplest solution would be to legislate that decisions made by the Board or WCAT about the duty to accommodate do not oust the worker's right to seek a remedy in another venue and do not bind subsequent adjudicators. However, employers may fairly raise concerns about being required to relitigate substantially the same issues in multiple venues.

31. Another possible solution would be to legislate that the Board's decisions about the duty to accommodate do not bind other decision makers, but also provide a mechanism whereby WCAT can suspend an appeal that might bind other adjudicators to allow the worker to first proceed with a human rights complaint or an arbitration under a collective agreement if they so choose. Once the other process has completed, WCAT would decide the appeal in light of any decisions made through that other process, or if the other process is resolved without a formal decision, as it would any other appeal. Where the other process has resolved the substantive issues, WCAT's process would be quite limited. Essentially, this would reverse what currently occurs under s. 25(1) of the *Human Rights Code*, R.S.B.C. 1996, c. 210 whereby the Human Rights Tribunal may suspend its proceeding pending the outcome of a related proceeding. Instead, WCAT would suspend its proceedings to allow the other human rights process to complete.

Claim Suppression

32. Embedding a duty to accommodate and reemploy injured workers will go a long way to combatting claim suppression and discrimination. However, it is not a complete

solution. A duty to accommodate and reemploy may not capture claim suppression involving relatively minor injuries that may involve little or no time loss from work. Employers may take measures to dissuade a worker from filing a claim or take retaliatory measures against those who do short of dismissing or refusing to reemploy the worker.

33. It is critical that the *WCA* prohibit all forms of claim suppression. Currently, the discriminatory action provisions in ss. 150-153 of the *WCA* apply only to workers who face discrimination for raising health and safety issues or for asserting their rights under Part III of the *WCA*. This does not capture workers who face discrimination solely on the basis that they have filed, or could file, a claim for benefits.

34. The *WCA* should therefore be amended to prohibit discrimination or retaliation against workers on the basis that they have exercised, or might exercise, any right under the *WCA*.

BOARD DECISION MAKING

Recommendations

a. Restore the Board's power to reconsider decisions beyond 75 days;
b. Create a process for a holistic review of complicated claims;
c. Eliminate Board medical advisors; and
d. Eliminate the provisions that make Board policy binding on all decision makers;

Restore the Board's power to reconsider decisions beyond 75 days

35. Confidence in the system is increased when workers know the Board can make the right decision on the merits. Confidence is decreased when the Board cannot get to the right decision because of a technicality. Currently, the Board cannot reconsider a decision more than 75 days after it was made. This not only unfairly prevents the Board

from making the right decision in many cases, but it is also counterproductive in its attempt to bring finality to the decision-making process.

36. The rule is unfair because critical information is often not available at the time the Board makes its initial decision. An example is setting the worker's long-term wage rate. The worker may have a dispute before the Employment Standards Branch with respect to unpaid wages. By the time that dispute is adjudicated, more than 75 days may have passed since the Board set the worker's long-term wage rate, so any amounts the worker recovers will not be included.

37. This leads to the second problem with the 75 day rule: the most sensible course of action for any worker is to review and appeal each and every decision just to preserve the option of having new evidence considered if it arises later. Rather than bringing finality, the 75 day rule encourages endless reviews and appeals. Many of these pointless reviews and appeals could be avoided if the worker simply had confidence that the Board could reconsider the decision on the basis of new evidence if and when the need arises.

Create a process for a more holistic review of complicated claims

38. Eliminating the 75 day rule will also give the Board some scope to better consolidate reviews in complex claims. We frequently see workers who have several related review and appeal streams, some of which have concluded while others are still being adjudicated. Many of these reviews and appeals turn on a convoluted analysis of what has been previously adjudicated, what findings from the previous decisions bind the current adjudicator, what has not yet been adjudicated by the Board, and what matters the current adjudicator can address. Over time, the piecemeal decisions on the claim become increasing inconsistent and incoherent.

39. In these cases, it would be beneficial to have a clear mechanism through which the Board can step back and evaluate the claim holistically rather than processing the

claim through a seemingly endless series of related review and appeal streams. This would of course require that the Board have the power to change decisions beyond 75 days.

Eliminate Board Medical Advisors

40. Independence is a key factor in creating confidence in the workers' compensation system. The Board's current overreliance on internal medical advisors to the exclusion of the worker's treating physicians is a point of significant concern. Doctors who have actually treated the worker are in the best position to opine on the worker's conditions. If the evidence from the worker's treating physicians is incomplete or unclear, the Board's first option should be contacting those doctors for additional information or clarification. The Board should only turn to other experts who have never met or treated the worker if it is unable to obtain the necessary information from the worker's physicians.

41. If it is truly necessary to obtain opinions from other doctors, those doctors should be independent of the Board. Regardless of actual bias, it is reasonable that a worker may perceive bias when the doctor reviewing their case transacts a substantial amount of business with the Board. The *WCA* provides a framework in s. 249 to ensure the assistance WCAT receives from health professionals is independent. Yet there are no corresponding safeguards when the Board's adjudicators obtain assistance from health professionals. The *WCA* should be amended to ensure that when the Board requires additional medical opinions, those opinions will be seen as reliable and independent.

Eliminate the provisions that make Board policy binding on all adjudicators in the WCB system

42. Board policy is a valuable tool that promotes consistent and reliable decision making. Yet forcing adjudicators to mechanically apply policy can produce unfair results. The Board makes thousands of decisions a year. It is simply impossible to

expect that a policy of general application can deal fairly with every conceivable claim. Discretion is critical.

43. Some policies do recognize the importance of discretion and build in some latitude for adjudicators. Yet even where a policy does grant discretion, adjudicators seem very hesitant to use it. This is perhaps understandable given the conflicting messages that adjudicators receive: They are told to apply Board policy without exception, but at the same time use their discretion.

44. A new culture is needed with respect to the role of policy in decision making. The end goal must always be fair decision-making on the merits and justice of the claim. Applying policy is a tool that can help achieve that goal, but it is not a goal in itself. Where Board policy leads to a decision that clearly conflicts with the merits and justice of the case, the latter must prevail.

THE APPEAL SYSTEM

Recommendations

a. Restore WCAT's power to independently provide relief with respect to Board policy that conflicts with the *WCA*;
b. Restore WCAT's human rights and *Charter* jurisdiction; and
c. Restore WCAT's reconsideration powers.

Restore WCAT's power to independently provide relief with respect to Board policy that conflict with the *WCA*

45. Just as it is critical to have WCAT provide independent review of the Board's adjudicative decision making, it is critical that WCAT have the ability to independently review and provide relief from the operation of Board policy that conflicts with the *WCA*. Independent oversight of the Board fosters confidence in the system. Many Board policies reflect institutionalized practices and understandings that have not been subjected to independent scrutiny for compliance with the *WCA*. When creating policy,

the Board may also understandably prioritize its internal needs and goals over compliance with the *WCA*. Independent review is critical.

46. WCAT currently has no independent power to provide relief from the operation of an unlawful policy. Courts have described the current policy review process set out in s. 251 of the *WCA*, which simply circles back the Board of Directors who made the policy in the first place, as "labyrinthine", "convoluted", "unwieldy", and "bizarre". Workers challenging Board policy are put on an endless carousel that never seems to result in a substantive decision. There is simply no justification for it and it should be eliminated.

Jozipovic v. British Columbia (Workers' Compensation Board), 2012 BCCA 174 at paras. 6 and 56, leave to appeal to SCC refused 34883 (8 Nov 2012)

Restore WCAT's human rights and *Charter* jurisdiction

47. The current distribution of jurisdiction with respect to the *Charter* and human right is frankly perplexing. It is absurd to suggest that the Board should have the ability to apply the *Charter* and adjudicate a worker's human rights, while WCAT as an independent appeal body has no power to review any of it.

48. The current system creates serious unfairness. Workers who fail to advance complicated *Charter* or human rights arguments at the Review Division will have their rights effectively foreclosed because WCAT has no power to address the issues and Courts generally refuse to consider new issues on judicial review.

Denton v. British Columbia (Workers' Compensation Appeal Tribunal), 2017 BCCA 403

49. Workers are also compelled to advance *Charter* or human rights challenges at the Review Division despite the fact that the factual and legal underpinnings of the claim may change dramatically at WCAT.

50. The absurdity of the current system is illustrated by WCAT Decision No. A1802933. After being denied benefits under s. 5.1(1) of the *WCA,* the worker sought review and properly advanced a *Charter* challenge to the legislation. On review, he was successful in obtaining benefits under s. 5.1(1) of the *WCA*, so the Review Division found it unnecessary to address the *Charter* challenge. The employer then appealed to WCAT. WCAT allowed the employer's appeal, but because WCAT has no *Charter* jurisdiction the worker was left with no benefits and answer at all to the *Charter* challenge.

51. Confidence in the system is shaken when workers cannot even obtain a decision on the merits. WCAT is the senior, independent tribunal in the system. If the Board can make decisions applying the *Charter* and the *Human Rights Code*, it is critical that WCAT have the power to do so as well.

Restore WCAT's reconsideration powers

52. Prior to BC Court of Appeal's decision in *Fraser Health Authority* v. Workers' Compensation Appeal Tribunal, 2014 BCCA 499, aff'd [2016] 1 S.C.R. 587 (*Fraser Health*), WCAT routinely used its reconsideration powers to correct profoundly flawed decisions without forcing the worker into the court system. This was a practical solution that seemed to benefit all parties. Indeed, the scope of WCAT's reconsideration powers was raised independently by the Division hearing the appeal in *Fraser Health*, and not by any of the parties.

53. WCAT makes thousands of decisions a year. There are bound to be decisions that miss the mark entirely. It would seem to be in everyone's interest to correct those serious mistakes where possible without the expense and hassle of a court case. The Court's decision in *Fraser Health* also creates serious difficulty for workers who are not familiar with the nuances of administrative law because WCAT can reconsider some, but not all, of the grounds for review a court can consider. A worker seeking reconsideration at WCAT must therefore carefully cast the error as a breach of

procedural fairness, as oppose to an attack on the substantive decision. This can also create confusion when the worker subsequently pursues judicial review, particularly when WCAT reviewed some, but not all, of the grounds for review being advanced.

54. The *WCA* should therefore be amended to permit WCAT to reconsider a decision that contains an error that would allow a court to set the decision aside on judicial review. Reconsideration should be a permitted, but not mandatory, aspect of the appeal process. Workers who wish to proceed directly to judicial review should retain that option.

PERMANENT DISABILITY AWARDS

Recommendations

a. Eliminate the "so exceptional" requirement for LoE awards;
b. Create a mechanism to review PFI ratings to ensure they reflect lost earning capacity;
c. Eliminate the 2.5% cap on chronic pain; and
d. Provide non-economic awards, especially in cases where a permanently disabled worker is not entitled to other financial compensation under the *WCA*.

Eliminate the "so exceptional" requirement for LoE awards

55. The purpose of permanent disability awards is to compensate the worker for lost earning capacity. The LoE method provides a targeted, individualized assessment of the worker's lost earning capacity. There is no principled basis to restrict the use of the LoE method in favour of a PFI estimate that captures only the average lost earning capacity for all workers across all occupations.

56. The notion that PFI estimates must be preferred for administrative efficiency is misguided. The Board's current practice is to compare the worker's pre and post-injury

earnings when applying the "so exceptional" test, so the Board must perform this assessment anyway. Nor would eliminating the "so exceptional" test mean that the Board must constantly reassess the worker's lost earning capacity over time. Like the PFI method, the LoE method is simply an estimate of the worker's future lost earning capacity, albeit an imperfect one.

57. If anything, it is debatable whether the PFI method should continue to be used to estimate lost earning capacity. It is unclear why a PFI estimate would ever be preferred to a targeted assessment of the individual worker's lost earning capacity. The 1999 Royal Commission recommended that the practice of estimating lost earning capacity using the PFI method be discontinued and most other Canadian jurisdictions stopped using PFI to estimate lost earning capacity long ago.

The 1999 Royal Commission, c. 1, p. 22

58. In BC, the PFI method often seems to serve as some unprincipled and incoherent non-economic award. On the low-side, workers with debilitating chronic pain routinely get 2.5% as some form of offensive "go away" money even when their ability to earn is profoundly impaired. On the high side, every single worker with work related paraplegia is estimated to have lost 100% of their earning capacity even though this is obviously false, and even offensive.

59. Despite the serious shortcomings of the PFI method when estimating lost earning capacity, its continued use is justifiable provided the current "so exceptional" restrictions on the LoE method are lifted. In fact, both the LoE and the PFI methods have shortcomings, and each method compensates in some ways for the shortcomings of the other.

60. The shortcomings of the PFI method have been discussed previously: it often bears no relation to lost earning capacity at all, and even if it did, the estimate is often completely divorced form the workers individual circumstances. The LoE method, on the other hand, does take into account the worker's individual circumstances, yet it

suffers from the limitation of trying to project long-term outcomes based on the worker's current circumstances. For example, a worker who returns to an accommodated position with the accident employer may have no immediate loss earnings, but the disability may limit their employment prospects significantly if they are forced to switch jobs down the road. Indeed, as employment becomes increasingly precarious, the idea that a worker will return to work with an employer and remain in that position until they retire is increasingly a myth.

61. For these reasons, we recommend a return to a system where the worker's pension is calculated using the LoE method or the PFI method, whichever is most equitable in the circumstances.

Create a mechanism to review PFI ratings to ensure they reflect lost earning capacity

62. For the PFI method to be in any way justifiable as a method of estimating lost earning capacity, there must be evidence linking the ratings to actual lost earning capacity. The Board rarely offers such evidence when reviewing impairment ratings. In fact, the Board most often proceeds as though the ratings are global estimates of the overall impacts of the disability. The Board should convene an independent panel to review the PFI ratings and adjust the ratings to ensure they reflect current research regarding lost earning capacity. Reviews should be carried out regularly to ensure the ratings reflect the best information available.

Eliminate the 2.5% PFI cap on chronic pain

63. While many of the PFI ratings need to be reassessed, chronic pain warrants special attention. Currently, every worker with chronic pain is limited to 2.5%. The notion that chronic pain manifests as one, single, level of impairment in all workers is absurd. It is even more absurd to believe that level of impairment is 2.5%. There is now no debate that chronic pain in real and can manifest differently in different workers. A rating scale is needed to capture the full range of possible impairment. While it is

clear that the 2.5% cap on chronic pain should be eliminated, the exact structure of the rating scale is best determined through the policy consultation process that includes stakeholders and experts with respect to chronic pain.

Non-Economic Loss

64. There has been much debate in the worker community about full versus fair compensation. We suggest that framing the debate in this manner is somewhat unhelpful. While we certainly take no issue with the notion of providing "full compensation" to injured workers for economic loss, we suggest that "full compensation" for economic loss does not always result in "fair compensation". It may be time for BC to look into the providing non-economic awards, at least in certain situations.

65. British Columbia is one of the few jurisdictions in Canada that limits compensation for permanent disability to the impairment of the worker's earning capacity. Most other jurisdictions provide compensation for the non-economic impacts of the injury that is in addition to the compensation the worker receives for lost earning capacity. In most jurisdictions, the PFI estimate that BC uses to estimate lost earning capacity is in fact used to estimate a "non-economic" award.

66. We fully acknowledge that providing "non-economic awards" based on the worker's PFI rating becomes complicated if the PFI method is retained as a method of assessing the worker's "economic award". There may be an appearance of double compensation, although it is not clear that this is any different than the majority of other jurisdictions that provide both an economic and non-economic award for permanent disabilities. Choosing between the two, it may well be preferable for workers to continue to have access to economic awards calculated using the PFI method.

67. However, it may be worth investigating the possibility of providing non-economic awards in certain circumstances, particularly in cases where the worker would otherwise

be left without any financial compensation at all for the permanent disability. For example, suppose a worker is diagnosed with a serious occupational disease such as asbestosis at the age of 70 after they have retired. There is no true economic loss in the form of lost earnings. The worker has not been prejudiced in their ability to work and save for retirement. Yet is it fair that they get nothing beyond health care benefits despite having no cause of action against the employer for the exposure?

68. The *WCA* should therefore create some mechanism through which the Board can provide non-economic awards, at least in some circumstances.

MISCELLANIOUS

Pay interest

69. It is profoundly unfair that the Board does not pay interest when a worker is wrongly denied benefits. Many workers spend years in the review and appeal system. If they finally succeed, their award is in effect diminished by the fact that they do not get interest to compensate for the intervening years. The fact that many successful reviews and appeals are not based on Board error, but rather new evidence, provides no excuse for not paying interest. The WCB system is investigatory. It is the Board's job to obtain the evidence it needs to make a sound decision. When compensation is delayed, the worker has already suffered financial hardship in the intervening years. They may be in debt, and in fact paying interest on those loans. It is unfair to compound the unfairness resulting from the delay by refusing to pay the worker interest.

Remove the "at or immediately before the date of the disablement" requirement from s. 6(3) of the WCA

70. The presumption in 6(3) of the *WCA* currently applies only if the worker was employed in the process or industry "at or immediately before the date of the disablement". In many cases, this makes little sense. Many of the diseases identified in schedule B, such as asbestosis, silicosis, or cancer, do not develop or become

disabling immediately after the worker is exposed. A worker who develops asbestosis after being repeatedly exposed to asbestos in the workplace should not be denied the benefit of the presumption in schedule B simply because they switched to a desk job a year before the asbestosis became disabling. The requirement that the worker be employed in the process or industry "at or immediately before the date of the disablement" should be removed. If the presumption for a particular disease warrants a temporal connection between the exposure and disablement, that should be part of the criteria for that particular disease.

Thanks you for considering these submissions,

July 19, 2019

Kevin Love