BRITISH COLUMBIA | Workers' Advisers

26 July 2019

By email

Workers Compensation System Review
Attention: Janet Patterson, Reviewer

Dear Janet Patterson,

Re: Workers' Compensation System Review

Thank you for meeting with us to discuss your review of the workers' compensation system. As we said during our meeting, we believe the Workers' Advisers Office has a unique perspective on the compensation system and are eager to offer you that perspective to the extent that it may assist you in your review.

We thank you also for the opportunity to provide further input in writing. As discussed at our meeting, the following provides more detail on some of the issues we discussed with you, as well as summarizes proposals we have made to WorkSafeBC (the "Board") through their policy review process and the Petrie review.

We have grouped our comments and suggestions into four general themes of your review:

1. Vocational rehabilitation,
2. Gender-based Plus analysis,
3. Worker-centred approach to service delivery, and
4. Increasing confidence in the workers' compensation system.

Our approach suggests that certain principles should be kept in mind when contemplating changes to the workers' compensation system to better support injured workers and increase confidence of workers and employers in the system.

All references are to the *Workers Compensation Act* and the *Rehabilitation Services & Claims Manual*, except where noted.

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1. Vocational rehabilitation ("VR")

We suggest that an effective worker-centred vocational rehabilitation system should consider the following principles:

a. That the Board should not be afforded discretion in the requirement that it provide vocational rehabilitation when a worker is unable to return to their pre-injury job

Section 16 states that "the Board may take the measures… that it considers necessary or expedient…." We suggest that this amounts to a double portion of discretion. Not only is the Board vested with discretion to determine what measures are necessary or expedient, but also discretion to grant or not grant VR benefits at all. While we recognize that the Board requires discretion and flexibility in providing VR benefits, we suggest that VR benefits *per se* are integral to a complete and well-functioning workers' compensation system. Also, we note that the dual criteria of "necessary or expedient" can be contradictory, and a decision maker may use one or the other to deny VR benefits and remain within the *Act*.

b. That a worker should not suffer gaps in wage replacement benefits when waiting for the Board to start VR planning or if the Board makes a VR decision which is found to be wrong

There are situations in which workers who cannot return to their pre-injury employment will have their wage replacement benefits interrupted for months, or even years, without compensation. In particular, this is the case where:

- A worker is found to have plateaued and unable to return to their pre-injury employment. They are referred to the VR department, but several months can pass before the VR actions the file and planning benefits commence. In the meantime, their benefits are interrupted.

- A worker is given an unsuitable VR plan. Eventually, a new plan is provided following a review or appeal, but in the meantime job search benefits have run out for months or years. Unless the worker can document a self-directed VR plan in the meantime, the worker receives no wage replacement for the period of the gap. For an example of this situation, see Review Division Decision R0180150.

- A worker's condition is deemed resolved, but following an appeal or review is found to have plateaued shortly after the canceled resolution date with permanent disability that prevents return to the pre-injury job. Again, unless the worker can document a self-directed VR plan in the meantime, they receive no wage replacement for the period of the gap, other than the PPD.

c. That, wherever possible, workers are accommodated by employers when they suffer permanent injuries

Unlike some Canadian jurisdictions, British Columbia's *Workers Compensation Act* does not refer to a right to return to work with the pre-injury employer. Chapter 11 of the RSCM does provide that unaccommodated and accommodated return to work with the pre-injury employer are the first two options that the VR department should consider, and that the department will "encourage" the employer to consider these options. It does so, however, without reference to section 13 of the BC *Human Rights Code*, which prohibits discrimination in employment on the basis of physical or mental disability.

We support the recommendation of the Employers' Advisers Office ("EAO") to Mr. Petrie that Policy item #115.30 be amended in order to provide better incentives to employers to accommodate restrictions and limitations arising from workplace injuries. In particular, the EAO proposed that the policy be amended so that employers who actively participate in a return to work or gradual return to work program, and are successful in returning an injured worker to safe work in either capacity within the first ten weeks of a claim, will have any claim costs incurred during that time excluded from their experience rating. We also agree with the EAO's proposal that cost relief should be considered for any re-injury occurring during a transitional return to work program, especially if such re-injury does not arise from work which exceeds the restrictions and limitations set by the Board.

Also, while accommodation is generally a win-win situation, there is sometimes a downside for a worker. If a worker has been significantly accommodated by an employer, they may not be competitively employable in their nominal position. However, their loss of earnings entitlement, if any, will be calculated on the basis of actual earnings. Therefore, if the position with the employer ends for some reason, such as redundancy or insolvency, the worker will suffer a significant loss of earnings for which he or she has not been compensated. Due to section 96(2), their only recourse would be to request an extension of time to review of the loss of earnings.

Some comfort and security could be provided through letters of understanding between the Board, the employer, and the worker, setting out the terms and expectations of accommodations. This could serve to underline the importance of accommodations, and create an evidentiary record of just what the accommodations are.

d. That tracking long-term VR outcomes can help the Board make a more effective VR program for workers

To our knowledge, WorkSafeBC does not track the long-term outcomes of VR plans. We suggest that doing so will provide valuable feedback that could be used to improve services to workers. In particular, it would be interesting to see how many workers achieve and maintain full and durable employment in the target occupations of their VR plans.

e. That Indigenous people may require a different approach to make their VR plan more effective

The Indigenous population is young and growing more rapidly than the general population, meaning that Indigenous peoples are anticipated to comprise a significantly larger proportion of the Canadian labour market in the next decade.[1]

In 2010, the average income for Indigenous people living on-reserve was $18,586, compared to $29,780 for all Indigenous people and $41,052 for non-Indigenous people. This is important as it has an impact on the level of entitlement to benefits like Vocational Rehabilitation.

The barriers to Indigenous workers' full participation in the labour market are complex and interrelated, relating to, among other things, the impacts of colonization, geography, and barriers to education. Our view is that Indigenous workers and the compensation system would benefit from better understanding those barriers in order to make the compensation system generally, and the VR program in particular, more effective for Indigenous people.

For example, questions worth asking in this context include:

1. What impact have barriers to employment had on wage rates and access to work other than low skilled positions, and how might the compensation system generally, and the VR program in particular, be enhanced to address those issues?

2. What impact would relocation under Policy #88.90 have on an Indigenous person living on traditional lands and communities?

2. Gender-based Analysis Plus (GBA+)

We suggest that changes related to GBA+ should consider the following principles:

a. That adjudication of activity related soft tissue disorders ("ASTDs") should acknowledge the physical differences between men and women

It has been our long experience that ASTDs experienced by workers in traditionally female employment sectors are accepted at lower rates. Further research should be directed at the study of ASTDs experienced by nurses, care aides, and office workers, especially those injuries involving the hands and forearms.

Medical research has confirmed that occupational risk factors for women are different and have lower thresholds. Thus, the application of non-gendered risk factors in the case of ASTD claims may create a bias against acceptance of women's claims, even though many of the risk factors are higher for women by virtue of inherent biological and other factors.

[1] [1] National Collaborating Centre for Aboriginal Health (2017), *Employment as a Social Determinant of First Nations, Inuit and Metis Health*. Prince George, BC.

We suggest it would be useful for WorkSafeBC to review the recent medical evidence concerning risk factors generally, and with a GBA+ lens.

b. That women experience very high rates of sexual harassment in the workplace that lead to mental stress

Presumption is afforded to workers when they are diagnosed with an occupational disease that is commonly understood to arise from exposure to occupational risk factors. A recent amendment to section 5.1 of the *Act* created a presumption in favour of first responders who develop certain mental disorders. The rationale behind this change was the common understanding that most first responders are exposed to traumatic events that lead to certain mental disorders. This amendment created a rebuttable presumption of causation. There are approximately 17,000 first responders in the British Columbia workforce and 30% (~5,100) will develop PTSD or another mental disorder.

The American Psychological Association acknowledges in its diagnostic manual, the DSM-V, that women tend to have a lower threshold to certain traumas, especially those involving victimization by men. In a survey conducted by Employment and Social Development Canada it was found that 44% of women experience sexual harassment in the workplace. Being harassed by a supervisor or manager is also associated with lower self-rated physical and mental health and higher levels of reported mental stress.[2] There are approximately 1,300,000 women in the British Columbia workforce of which 44% is approximately 560,000. If even a fraction of these women develop a mental disorder, this is a significant portion of the population.

In view of this, we suggest WorkSafeBC conduct targeted research and analysis into workplace sexual harassment in order to develop a better understanding of the relationship between sexual harassment in the workplace and workplace mental health, and to inform future actions to support workers.

c. That the compensation system should not reinforce gender pay inequity

According to a report from Statistics Canada using data from 2017 on average hourly wages, women earn $0.87 for every dollar that men earn. Currently long-term average earnings are based on the gross earnings for the 12 month period immediately preceding the date of injury. When a woman is injured in an occupation with a known pay gap, consideration could be given to establishing the wage rate in the same manner as apprentices or learners, meaning the long-term average earnings would be based on the greater of:

- Time of injury earnings; or
- Earnings during the 12 month period immediately preceding the injury.

[2] [Statistics Canada, General Social Survey 2016]

If the worker's injury results in a permanent disability, the calculation of average earnings would be based on the gross earnings for the 12 month period immediately preceding the date of injury, of a male employed in the same trade, occupation, or profession.

3. Worker-centred approach to service delivery

We suggest that changes intended to provide a more worker-centred approach to service delivery should consider the following principles:

a. That improved communication between the Board and workers will lead to better outcomes and less frustration

It has been our long experience that frustration among workers with the service provided by the Board falls into three themes.

First, service would be greatly improved if WorkSafeBC was resourced and trained to clearly and completely explain their decisions, and their implications, to workers. Workers are often frustrated by a lack of explanation, confused by what decisions imply about their entitlements, and are then referred to WAO to receive that service.

Second, we receive frequent complaints from workers that WorkSafeBC staff do not return phone calls. At present, the only way a worker can have their call registered in their Case Management System (CMS) is by calling the WorkSafeBC Call Centre. We suggest that WorkSafeBC explore other technological solutions to ensure that calls are returned by Board staff in a timely way.

Third, increasingly, workers prefer using email and text to communicate. WorkSafeBC recently introduced a method for workers to use email to submit documents or other information. WAO has had a very robust electronic communication system in place for many years that allows workers to communicate with us when it is convenient for them. Adopting a more robust electronic communication system at WorkSafeBC that allows workers to communicate by email and text could greatly improve worker satisfaction with services provided, and would have the added advantage of measurement of response times to worker inquires.

b. That more training of Board staff, and less staff turnover on individual claims, leads to more consistent decision making and clearer communication

In recent years we have observed increasing staff turnover on individual files. Whether this is because there may be an increase in staff turnover or because of some systemic change in the method of file assignment, is unclear. Frequent reassignment of files to different Case Managers leads to lack of continuity in decision making, increased errors, other service issues, and frustration among workers who do not know who to talk to or who is making decisions on their file. Additionally, Case Managers who cover for others who are away can be reluctant to make decisions on a file, which leads to further frustration arising related to delays.

On a related point, we suggest that when a worker has multiple concurrent claims, all such claims should be overseen by a single Case Manager in order to reduce errors and so that the worker's degree of temporary disability and health care needs can be seen in a more holistic way.

c. That decisions on claims must be driven by the evidence on a claim, rather than other administrative factors

WorkSafeBC's Case Management System (CMS) is a comprehensive and sophisticated tool which has become an important mechanism whereby staff at the Board manage caseloads, track metrics and milestones. Measurement and metrics are certainly essential to the proper functioning of the compensation system. In our experience, there have been instances where milestones may not have aligned with a worker's recovery and durable return to work. For example, we have seen many premature plateau decisions where the very clear medical evidence (see below) on file indicates that a worker is either still in recovery or receiving medical treatment for their injuries. Negative or premature decisions can result in extreme financial hardship for workers when they are disabled from working and are forced to wait six to 18 months for the appeal system to correct a decision.

We also suggest that Case Managers be required to make a decision on whether or not a decision will be reconsidered when significant new evidence or information is provided.

The following are particular areas where we suggest decision-making could be improved.

i. Premature plateau date

We have seen plateau rulings made even though a significant treatment, such as surgery, is pending. Policy 34.54 (When a Worker's Condition Stabilizes) provides the guideline that where a potential change is likely to occur within 12 months, the worker's condition is to be considered temporary and the worker is to stay on temporary wage-loss benefits. While the policy appears clear, and a common-sense approach would seem to include pending surgery as a potential change, we have seen the policy interpreted to mean that where a condition is not likely to change on its own – as opposed to through an intervention such as surgery – then plateau has been reached.

We submit that a "significant change" as contemplated by Policy 34.53 should include surgery or other significant treatment, and therefore suggest that the policy be amended to make explicit that "significant change" includes medical treatment.

ii. Incomplete decision-making

We have observed several types of incomplete decision-making, such as:

- Neglecting to consider all psychological and physical aspects of disability resulting from concussions (for example, see WCAT *A1607156* and Review Division *R0227060*);

- Closing claims without:

    - Consideration of loss of earnings, and/or
    - Adjudication of additional conditions, such as chronic pain or depression, even when these are identified in medical records in the Board's possession, such as Physician's Progress Reports.

This results in workers not receiving benefits in a timely fashion or at all, and also results in unnecessarily complicated claim procedures including reviews and appeals.

It has become routine for us to have to ask for adjudication of temporary and permanent conditions not referred by Case Managers to Disability Awards. Oversight of adjudication of temporary conditions results in premature plateau decisions, lack of health care and unnecessary appeals. Similarly, not adjudicating permanent conditions results in gaps in health care, less durable returns to work and missed financial entitlements. Among the most frequent problems in this area are referrals for permanent specific and non-specific chronic pain, permanent psychological conditions and concussions.

The adoption of a formal, mandatory process to ensure that all temporary and permanent conditions are adjudicated and referred for assessment would help to address these issues.

iii. Psychological functional impairment awards

Appeals of psychological awards (both gross and number of successful appeals) at the Review Division and WCAT are very high and we fear that they risk bringing the system of assessment for psychological impairment into disrepute. We suggest a review by WorkSafeBC of the manner in which Disability Awards assesses psychological impairment in order to address this issue.

iv. Concussion adjudications

In concussion cases, we often find that symptoms are confused with conditions and *vice versa*, with the effect that assessments of permanent functional impairment awards leave out aspects of a worker's disability. We suggest that WorkSafeBC consider whether or not there is medical support for the value of Neuropsychological assessments in assessing permanent disability.

4. Increasing confidence in the workers compensation system

We suggest that changes intended to increase the confidence of workers and employers in the system should consider the following principles:

a. That when errors are identified, there should be some process for providing feedback so that they can be avoided in the future

We understand from both current and former Board staff that there is no consistent mechanism for providing feedback to WorkSafeBC staff on appeal results. A method for providing such feedback would help the Board to identify systemic issues, and improve decision making.

Similarly, where consistent patterns of error are identified, either through the appeal system or the complaint tracking system, WorkSafeBC should support enhanced staff training or other approaches in response.

b. That the Board's interest policy be structured to incent consistent, correct and timely decisions and make workers whole when mistakes are made

When the Board makes a significant mistake or is found to have erred in making a decision, no interest is paid to the worker. Workers may be forced into expensive borrowing, or to spend retirement funds while the 6 to 18 month (or sometimes much longer) appeal process is under way. Under current policy, when the delayed benefit eventually is paid there is no adjustment for the effect of inflation, borrowing costs, or lost opportunity.

We submit that any interest policy should not result in workers bearing the costs of errors, incent better and more timely decisions, and that this will help improve the credibility of the decision making process.

c. That there should be a mechanism in place for the correction of obvious errors at any time

Under section 96(5)(a) of the WCA, WorkSafeBC may not reconsider a decision or order if more than 75 days have elapsed since the decision or order was made. As a result, it often happens that an obvious and acknowledged error cannot be corrected because that deadline has passed. Where the decision concerns a long term wage rate, the error can be particularly obvious, and the result particularly devastating, as the worker will be under-compensated in every class of benefits except health care. This problem has been raised by the Provincial Ombudsperson and other stakeholders.

Here again, more flexibility to allow the Board to change decisions at any time when there has been an obvious mistake would improve the credibility of the decision making process from an injured worker's point of view.

d. That there should be a review of the Permanent Disability Evaluation Schedule to ensure that it reflects realistic levels of disability associated with certain injuries

With respect to the Permanent Disability Evaluation Schedule ("PDES"), Mr. Winter[3] stated:

> … the pension award under the loss of function method is intended to cover the presumed average impairment of earning capacity suffered by the average worker arising from the same type of disability. [page 191]

Pursuant to Section 23(1) of the *Act*, the percentages set out in the PDES must reflect the estimated impairment of the worker's earning capacity arising from the nature and degree of their injury. The specified percentage should not simply reflect the percentage of medical impairment which the injury represents vis-à-vis the total disability of the person. [page 203]

We suggest that most common injuries are still rated too low. A 2013 Discussion Paper by the Board's policy department outlined the most common permanent functional impairment ("PFI") ratings over a five year period, along with the associated average monthly awards. To illustrate the case, we will focus on spinal injuries which often give rise to a greater impact on a worker's earning capacity than reflected in PDES. The restrictions and limitations associated with these injuries demonstrate the effects they have on an injured worker's earning capacity.

The 2013 Discussion Paper lays out that a combination of the average cervical and lumbar spine disability equates to a 12.57% disability (5.07% + 7.50%) and an associated average monthly award of $486.56 (229.80 + $256.76).

Spinal injuries of these percentages typically give rise to disabling restrictions and limitations such as preclusion from medium/heavy lifting, prolonged sitting and/or standing, stooping/crouching/kneeling, and repetitive torso twisting. They may also give rise to other restrictions and limitations such as preclusion from medium/heavy pushing and pulling and overhead work. These are significant barriers to obtaining and maintaining employment and have a severe impact on earning capacity.

Appendix C to the 2013 Discussion Paper (Comparison of Ratings in Workers' Compensation Jurisdictions) states that the maximum disability rating for the cervical spine is 21%, which is in keeping with the numbers provided in the jurisdictions of Manitoba (30%), New Brunswick, Newfoundland, and Quebec (all 20%).

However, Appendix C also states that the maximum disability rating for the thoracic spine is 6%, which is not in keeping with the jurisdictions of New Brunswick (20%) and Newfoundland (50%). Appendix D (Interjurisdictional Comparison - Explanatory Notes) is silent on this comparison.

Furthermore, Appendix C states that the maximum disability rating for the lumbar spine is 24% which is not in keeping with the numbers provided in the jurisdictions of New Brunswick and

[3] Core Services Review of the Workers' Compensation Board, Alan Winter (WCB Core Reviewer), 2002

Newfoundland (both at 50%) and Quebec (30%). Appendix D explains that Quebec's percentage is higher based on inclusion of other ratings, but is silent on the comparison with higher awards from New Brunswick and Newfoundland.

In this scenario, we suggest that an average monthly award of $486.56 is unlikely to be an accurate estimation of impairment of earning capacity for spinal injuries of workers in British Columbia, and that the Board should consider increasing these numbers in keeping with the jurisdictions of New Brunswick and Newfoundland, as they relate to the Section 23(1)(a) requirement.

Mr. Winter recommended in his report in 2002 (as have many others since that time) that the PDES be reviewed to better reflect true levels of disability in the assessment of permanent functional impairment. Although the WorkSafeBC's Policy, Regulation and Research Division recently instituted annual reviews of PDES, these have focussed on discrete items, and have not as of yet looked at these more fundamental issues. We suggest that the Board's Policy, Regulation and Research Division could undertake this more fundamental review of PDES in order to address differences between current ratings and their actual effects on disability, and between British Columbia and other Canadian jurisdictions.

e. That an independent and effective mechanism for workers to raise complaints will make the system as a whole more effective and accountable

The Fair Practices Office is an integral part of WorkSafeBC's efforts at quality control and offers an excellent opportunity to increase worker confidence in the compensation system. This role could be enhanced by being given independence of oversight (or some variation, such as being converted into an external ombudsperson-like office), and by ensuring it is properly resourced to provide service accountability in order to improve trust and confidence of workers.

f. That a speedy and just appeal system that has clear jurisdiction in all matters in dispute leads to better accountability and better outcomes

The review and appeal process is integral to quality control and good decision-making in the compensation system. This is all the more so as decisions of WorkSafeBC, the Review Division, and WCAT are mostly insulated from the scrutiny of the Courts. Ideally, this process should be speedy and just. However, we note below the many ways the process can be unnecessarily complicated, leading to delays and confusion for workers.

i. Jurisdiction

One major issue is the lack of congruence between Review Division jurisdiction and that of WCAT. The Review Division has jurisdiction over VR issues, but WCAT does not. Where a worker receives a negative decision from the Review Division, they must make do with insufficient or no VR benefits unless or until they can come at the issue indirectly through an appeal of a loss of earnings decision. The result is delay and over-complication of litigation.

Likewise, the Review Division has jurisdiction over *Charter of Rights*, but WCAT does not. As workers are less often represented by counsel at the Review Division level, viable Charter arguments are likely to be overlooked, and yet the courts have held that a worker who fails to raise a Charter issue in the administrative review process may be estopped from doing so before the courts. (See, for example, *Denton v. WCAT* 2017 BCCA 403.)

Also, WCAT has jurisdiction over Review Division decisions, subject to specific exceptions. One such exception, pursuant to section 4(b) of the *Workers Compensation Appeal Regulation*, is a decision by the Review Division to deny a worker's application for an extension of time to file a Request for Review. Given that such decisions effectively determine the issues the worker seeks to raise on review, these decisions have just as much importance as any other Review Division decision.

We also note that pursuant to sections 96.2(g) and 240(2), Board decisions regarding an application for a reconsideration under section 96(2) cannot be reviewed by the Review Division, and must be appealed to WCAT. While the original intention of this exception was laudable, it has not proven useful in practice, and leads to confusion given it departs from the general two-level appeal scheme.

iii. *Scope of WCAT reconsiderations*

Following the decision of the Court of Appeal in *Fraser Health v WCAT*, 2014 BCCA 499, the authority of WCAT to reconsider its own decisions on common law grounds has been restricted to cases of true jurisdiction and procedural fairness. Previously, WCAT conducted reconsiderations of its own decisions, and set them aside where these were found to be patently unreasonable. Both the worker and employer communities agree that WCAT's previous practice was beneficial as a quicker and cheaper alternative to judicial review.

g. That fairness and equity should be the basis of assessment of all worker benefits

i. Retirement age

Workers who end up with permanent disabilities are generally financially compromised by them, especially when the impairments are more serious. As a result, they often simply cannot afford to retire at age 65, and therefore need to postpone retirement plans. Amending policy to allow consideration of post-injury intention and circumstances would allow the term of wage replacement benefits to better reflect the period of people's working lives for which they are disabled, and so better reflect the full economic impact of their disabilities.

ii. Loss of earnings assessments

Policy 40.00 (Section 23(3) Assessment) creates a two-step process under which

- the Board first determines whether or not the combined effect of the worker's occupation at the time of the injury and the disability resulting from the injury is "so exceptional"

that the permanent functional impairment ("PFI") award does not "appropriately" compensate the worker, and if it does not,

- the Board then assesses the amount of the worker's loss of earnings ("LOE").

We suggest this process has inherent difficulties because it is difficult to say whether or not the PFI award properly compensates the worker unless one determines the amount of the loss of earnings. The Board will often make "no LOE" determinations before it can be reasonably said that the worker has achieved a durable return to work. As it does not appear to us that the two-step process is mandated by the *Act*, we suggest that an estimation of loss of earnings in every case is more appropriate.

As for the issue of "appropriate" compensation, Practice Directive C6-2 provides the formula

> Pre-injury gross average earnings – (Post-injury gross earnings in a suitable occupation + Section 23(1) award),

and states that where the difference is ≤ 5% of pre-injury earnings, there is no "significant loss of earnings." Where the difference is in the range of > 5 to < 25%, there may be a significant loss of earnings. Only where the difference is greater than 25% will a significant loss of earnings be presumed. We suggest that these provisions are not consistent with the language of section 23. For example, most workers would certainly consider a 6% reduction in their wages to be "significant".

Accordingly, we suggest that:

- the Policy be amended to require an estimation of loss of earnings in every case, and
- the Practice Directive be amended to state that any difference over 10% are to be presumed significant, and where the difference is under 10%, a case-by-case determination must be made.

iii. Health care benefits

As with VR benefits, the *Act* uses discretionary language: "may furnish or provide for the injured worker any medical… care or treatment… that it may consider reasonably necessary…."

We suggest that this amounts to a double portion of discretion. Not only is the Board vested with discretion to determine what measures are necessary or expedient, but also discretion to grant or not grant health care benefits at all. While we recognize that the Board requires discretion and flexibility in providing health care benefits, we suggest that health care benefits *per se* are integral to a complete and well-functioning workers' compensation system.

iv. Wage rates – casual workers

As noted above, wage rate decisions are vitally important as they affect almost every class of benefits.

Section 33.4(2) precludes Board officers from considering exceptional circumstances in relation to certain defined classes of workers: apprentices, those employed under 12 months, those insured through personal option protection ("POP"), and casual workers.

As for the first three classes, the earnings used for these workers are likely higher than their actual 12 month wages, or in the case of POP insured, set at a rate that they choose. Already conferred a benefit or a choice, these workers arguably do not need to have access to exceptional circumstances assessment.

We suggest this is different for casual labourers. Just like the general classes of workers, casual labourers may suffer periods of unusually low wages due to cyclical economic forces, non-compensatory illnesses, or personal factors. However, unlike apprentices and employees of less than 12 months, they have no boosted wage rate; unlike POP insured, they have not chosen their level of coverage; and unlike the general class of workers, they cannot access an exception for exceptional circumstances.

We suggest that excluding casual workers from the exceptional circumstances provision is not consistent with a fair and equitable approach to the assessment of worker benefits.

h. Specific health conditions

i. Chronic pain

Currently, Policy 39.02 provides a flat PFI rate of 2.5% for chronic pain. In his 2002 report Alan Winter recommended a rating schedule to be developed along four classes:

- Mild 1-5%
- Moderate 10%
- Moderately Severe 15%
- Severe 20%

Mr. Winter also stated:

> The percentage of impairment applicable to the worker would cover the chronic pain experienced by the worker, as well as any other related condition suffered by the worker arising from his/her chronic pain. For example, any permanent disability award granted to the worker for his/her chronic pain, pursuant to the rating schedule to be developed by the WCB, would fully encompass a subsequent diagnosis of depression arising from the chronic pain suffered by the worker. [page 230, emphasis added.]

Adopting Mr. Winter's recommendation would mean that only psychological conditions arising directly from the compensable injury or illness could lead to a separate percentage award for the related permanent impairment of earning capacity, and there would be no additional award for any psychological impairment developed from the chronic pain condition itself.

The degree of impairment due to chronic pain varies greatly from case-to-case, and the current flat rate does not adequately compensate workers in many cases. Accordingly, a range may be more appropriate, provided that specific criteria can be formulated. However, we would not endorse such a proposal unless diagnosable psychological conditions resulting from chronic pain were rated separately from chronic pain. We also suggest that there are no strong policy reasons to have an arbitrary cap on these conditions.

We suggest that instituting a range for chronic pain awards would be an improvement, provided that its lower bound is not less than 2.5%, and that it does not preclude the independent rating of any psychological condition whether flowing from the original injury or from sequelae of the original injury, including chronic pain.

ii. Diseases with long latency periods

The presumption under section 6(3) that an occupational disease is work-related applies only where the worker "at or immediately before the date of disablement" was employed in a specified industry or process.

Sometimes there may be a long latency period between exposure and disability, during which the worker may leave employment. For instance, certain diseases currently listed under Schedule B, such as mesothelioma, have latency periods that span decades. In these cases, where the worker was not employed at or immediately before the date of disablement, the worker does not obtain the benefit of the presumption, but must establish the link between their disease and their employment. This applies even though the science would support the presumption of a long latency period for certain diseases and occupational processes.

iii. Non-traumatic hearing loss

Currently, the PDES provides a scale of compensation for traumatic hearing loss which is roughly comparable to the scale laid out in the AMA's *Guides to the evaluation of Permanent Impairments, Sixth Edition*. Non-traumatic hearing loss, on the other hand, is governed by Schedule D of the *Act*, and is capped by section 7 of the *Act* at 15%. As a result non-traumatic hearing loss is compensated at half the rate of traumatic hearing loss.

Since the worker is equally deaf regardless of whether the cause of the hearing loss was traumatic or non-traumatic, we suggest that there is no strong policy rational for the differential.

iv. Psychological conditions

Section 5.1 claims for mental disorders present special challenges when it comes to the application of section 55 and limitation periods for making a claim for compensation. Mental disorders do not neatly fit in either the injury box or the occupational disease box. Furthermore, such conditions

- May come on insidiously and/or a long time after the negative event or events, blinding the worker to the workplace connection, or even the existence of the condition;
- Can affect the worker's perceptions and moods in ways that prevent them from starting a claim (e.g. defeatism, aversion to conflict, reduced executive function);
- Carry a stigma, especially for workers in first responder occupations, and negative career implications, thus further inhibiting a worker from making a claim; and
- Have inferior status under the *Act*, since, unlike physical conditions, a diagnosis is required prior to a claim becoming acceptable.

With respect to the last of these, we note that whereas workers usually have easy access to family doctors, the same cannot be said for psychiatrists or psychologists.

The WAO suggests these factors be taken into account in any potential recommendations for changes to the compensation system.

Conclusion

Thank you once again for this opportunity to provide input to your report. We would be happy to meet with you again in order to clarify any of the above, or offer our perspective on other issues that may have arisen during your consultations.

All of which is respectfully submitted.

Lucas Corwin, Executive Director
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