*Introduction*

First, I would like to express my appreciation to the Minister of Labour for taking the important step to initiate this review. The Workers Compensation Board of Directors is also to be credited for providing the necessary funding and research support for the review. The appointed reviewer has the necessary legal expertise and depth of experience with the workers compensation system to fully and fairly address the important issues outlined in the terms of reference. I very much appreciate the opportunity to present my views on the issues raised in this review.

My direct involvement in the workers compensation system spans 45 years within which I have served in a range of positions in both compensation and prevention. In the 22 years prior to my retirement in 2013, I served in the compensation appeals system including deputy chief appeal commissioner with the WCB Appeal Division and vice-chair of the Workers Compensation Appeal Tribunal. Subsequent to my retirement I have worked as a consultant with respect to prevention and disability management issues. In this capacity I provided a presentation at the 2014 World Congress on Safety and Health at Work, a 2018 report to the WCB Board of Directors "Restoring the Balance: a worker centred approach to workers compensation policy" and a co-presentation with an injured worker on "Disability Prevention: The Road to Recovery" at the 2018 International Congress on Disability Management and Return to Work.

## I. **Steps required to increase confidence of workers and employers in the workers' compensation system**

*Maintaining the integrity of the underlying principles of the WC system*

The British Columbia *Workers Compensation Act* Is based on the "Historic Compromise" where workers gave up their right to sue negligent employers for work accidents and disablement in exchange for no-fault compensation administered through an inquiry system rather than an adversary system. The Historic Compromise between workers and employers is based on five key principles that underly the *Act*:

**No-fault compensation**: workplace injuries are compensated regardless of fault. The worker and employer waive the right to sue. There is no argument over responsibility or liability for an injury. Fault becomes irrelevant, and providing compensation becomes the focus.

**Collective liability**: the total cost of the compensation system is shared by all employees. All employers contribute to a common fund. Financial liability becomes their collective responsibility.

**Security of payment:** a fund is established to guarantee that compensation monies will be available. Injured workers are assured of the prompt compensation and future benefits.

**Exclusive jurisdiction**: all compensation claims are directed solely to the compensation board. The board is the decision maker and final authority for all claims. The board is not bound by legal precedent: it has the power and authority to judge each case on its individual merits.

**Independent board**: the governing board is both autonomous and non-political. The board is financially independent of government or any special interest group. The administration of the system is focused on the needs of its employer and worker clients, providing service with the efficiency and impartiality.

These principles continue to form the basis of workers compensation law in British Columbia and other Canadian provinces.

The first step to ensure worker and employer confidence in the workers compensation system is to reaffirm the Board's commitment to the foundational principles upon which the *Workers Compensation Act* was founded. Several provinces have established these principles in a preamble to their legislation. For example Manitoba has articulated the principles underlying their legislation as follows:

> Manitobans recognize that the historic principles of workers compensation should be maintained, namely
>
> (a) collective liability of employers for workplace injuries and diseases;
> (b) compensation for injured workers and their dependants, regardless of fault;
> (c) income replacement benefits based upon loss of earning capacity;
> (d) immunity of employers and workers from civil suits;
> (e) prevention of workplace injuries and diseases;
> (f) timely and safe return to health and work; and
> (g) independent administration by an arm's-length agency of government

**I urge this review to recommend that the Minister include in the *Workers Compensation Act* a statement of purpose and principles underlying the BC legislation.**

*Ensuring funding fairness for workers and employers*

The principle of collective liability is foundational to the funding of the workers compensation system. In the late 1970s and 1980s provincial compensation boards modified the funding mechanism with the introduction (and in some provinces expansion) of experience rating that adjusted the collective industry assessment rate for each employer based on that individual employers prior claim costs. As a result, employers with claims costs significantly higher than the industry average would pay a higher rate (surcharge) and employers with significantly lower claims costs would pay a lower rate(discount). The effectiveness of experience rating as a prevention incentive has been widely debated in Canada in the last three decades.

The late Prof. Terrence Ison, a leading expert on Worker's Compensation in Canada[1] and for former chair of the BC WCB, provided a detailed analysis of the significance of experience rating in 1986[2] and identified a range of unintended consequences that would likely result from this funding mechanism including:

- ER provides an incentive to control claims costs through the employer protests and appeals that foster a shift from the inquiry system to an adversary system increasing administrative costs;
- ER encourages some employers to discourage workers from filing a claim resulting in illegal claims suppression;
- ER can have a non-therapeutic effect by introducing overly aggressive claims cost control measures that can activate and\or prolong the disability;
- ER can promote premature return to work before the worker has recovered sufficiently to safely perform the work duties; and
- ER can shift limited health and safety staff and resources from prevention to claims management activities.

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[1] Ison is the author of several key publications on workers compensation in Canada, including *Worker's Compensation in Canada* (1983) and compensation systems for injury and disease: the policy choices 1994. He has also published numerous scholarly articles, comments and re-port on critical issues related to workers compensation law in Ontario and other jurisdictions. In 2012, Ison receive the Ontario Bar Association Ron Ellis award for outstanding contributions and achievements in worker's compensation law.

[2] T.G. Ison, "The Significance of Experience Rating," Osgood Hall Law Journal; Volume 24, Number 4 Winter 1986), pp. 723 -742.

With respect to experience rating as a prevention incentive, Ison's assessment was direct:

> The assertion that experience rating has a beneficial influence on occupational health and safety, or at least on safety, is contrary to the evidence and unsupported by logic. Moreover, the position is worse than that. Experience rating probably has negative influences on health and safety.[3]

The international Institution of Occupational Safety and Health (IOSH) published a special issue of *Policy and Practice in Health and Safety* in 2012 that focused exclusively on experience training. This issue provides international perspectives on experience rating as well as insightful articles on the impact of experience rating in the Canadian context.

In a review of the literature on experience rating, the centrepiece of the issue[4], Mansfield et. al. point out:

> Although experience rating is intended to stimulate safer workplaces, a growing body of literature reveals that it has not achieved that effect and that, in some cases, it has contributed to unsafe workplaces. The absence of a safety effect may arise because employers focus on managing claims rather than prevention. Also, financial incentives may discourage employers from reporting injuries and put those employers who do report at a disadvantage relative to their peers. Furthermore, there is evidence that experience rating stimulates employer behaviours which can undermine the physical and mental health of injured workers.

The authors point out that experience rating is seen as introducing an adversarial dimension to the adjudication process that motivates employers to challenge claims. The authors observe:

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[3] Ibid. p. 728

[4] "A Critical Review of the Literature on Experience Rating in Workers Compensation Systems," L. Mansfield, E. MacEachen, E. Tompa, C. Kalcevich, M. Endicott, and N. Yeung; *Policy and Practice in Health and Safety;* Vol. 10, No. 1. pp. 3-25.

> …experience rating can be seen as bringing back the adversarial process of tort system that no-fault was designed to eliminate. With experience rating, the focus is once again on the interrogation and investigation of the injured worker.[5]

The authors point out that the use of reported claims rate to demonstrate the 'success' of experience rating may be misleading:

> A fundamental flaw of experience rating systems is that they are based on the assumption that reported claims data accurately reflect the frequency and severity of accidents. Indeed, the reporting of low injury rates may mask unsafe workplaces and concomitantly, increased the risk of harm to workers.[6]

In November 2012, the Canadian Institute for Work and Health hosted an international symposium on the challenges of workplace injury prevention through financial incentives. That symposium explored a range of issues around experience rating and alternate forms of prevention incentives from a range of perspectives that are available online[7].

Mike Wright, United Steelworkers Union, outlined labour's experience in Canada and the United States indicating that experience rating hides the true injury, illness and lost time experience in workplaces across all industry sectors and arguing that systemic changes will be needed to address this masking of injury risk. John McNamara from Ontario Hydro provided an employer perspective and acknowledge that loss time injuries are a poor measure of health and safety performance and reinforce the focus on the management of claims. He advocated a greater focus on incentives that are based on documented implementation of effective health and safety management systems. Marian Endicott provided an injured workers' perspective and noted that the insidious impact of experience rating on suppressing claims was difficult to document with scientific reliability. She described experience rating as "an addiction" embraced by compensation boards to respond to the political pressure to control claim costs and reduce assessment rates even though it undermined the fundamental principles on which the Canadian compensation system is based.

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[5] Ibid. P 9
[6] Ibid. P. 14
[7] International Symposium on the Challenges of Workplace Injury Prevention Through Financial Incentives: https://oldiwh.iwh.on.ca/prevention-incentives-2012

A 2012 review of the funding of the Ontario Workplace Safety and Insurance Board (WSIB), *Funding Fairness*, devoted a chapter to experience rating incentives.[8] The author, Harry Arthurs, acknowledged that there was some support for the proposition that experience rating may reduce claims, but pointed out that there was also evidence that experience rating created incentives for abuse such as claim suppression. He concluded that this created "a moral crisis" for the WSIB, since it had "failed to take adequate steps to forestall or punish the illegal claims suppression practices"[9]

The potential negative impact of experience rating on injured workers was also addressed by the Minister of Labour in Manitoba who commissioned an independent external review of the impact of experience rating on claims reporting. That review[10] documented evidence of under reporting of claims and claims suppression activities that was more prevalent in some industries and concluded that the Manitoba experience rating system "rewards employers who engage in these activities and gives them an advantage over the majority of employers who meet their injury reporting obligations under the Act."

The Manitoba WCB commissioned an independent consultant firm to carry out further research to identify and quantify the incidence of claims suppression in Manitoba. In that report - "Claim Suppression in the Manitoba Workers Compensation System"[11] the authors detailed the results of four separate survey measures that indicated that employer "overt claims suppression" ranged from 6% up to 19.8%. The authors state:

> The strongest of these estimates is derived from a general population based survey of injured workers. That survey found 11% of respondents had experienced or were aware of instances of overt claims suppression.

On April 28, 2014, the Manitoba Minister of Labour introduced amendments to the Manitoba Worker's Compensation act increasing the maximum fine on summary conviction from $7500 two $50,000 for failure to report an injury. The amendments also

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[8] Professor Harry Arthurs, Funding Fairness: A Report on Ontario Workplace Safety and Insurance System, Queens Printer, 2012.
[9] IBID. P. 81
[10] Paul Petrie, "Fair Compensation Review: A Review of the Impact of the Manitoba WCB Assessment Rate Model on Fair Compensation for Workers and Equitable Assessments for Employers," Report to the Minister of Labour, January 2013.
[11] Claim Suppression in the Manitoba Workers Compensation System:Research Report; Prism Economics and Analysis, November, 2013. Available online at: https://www.wcb.mb.ca/sites/default/files/Manitoba%20WCB%20Claim%20Suppression%20Report%20-%20Final-1.pdf

placed an onus on an employer who takes" discriminatory action" against a worker for filing a claim to prove that the action was unrelated to the worker making a claim. In making the announcement the Minister of labor stated:

> In addition to improved enforcement, a comprehensive review of the WCB rate model is underway, aimed at encouraging real prevention, strengthening system accountability and removing financial incentives to minimize or suppress claims. This review includes consultation with stakeholders, who will be asked their views on effective incentives to adopt meaningful injury prevention practices and programs. Incenting investments in workplace safety is a key to creating a culture of safe work in Manitoba.

Mansfiled et.al. note that employer claims management strategies can be humiliating to workers and inflict further psychological, medical and financial stress due to the adversarial nature of the claims management process employed by some employers. The authors also note that rehabilitation plans may be more responsive to financial interests of the employer rather than an effective rehabilitation of the worker.[12] The authors call for a more balanced research approach to provide definitive answers as to how experience rating motivates employer and worker behaviour and how experience rating affects workplace health and safety.

The integrity of the primary funding mechanism for workers compensation is a key consideration in maintaining and increasing the confidence of workers and employers in the workers' compensation system. I note that the Board's policy review work plan has scheduled a limited review of the Board's current experience rating plan (Experience Rating – Item AP1-42-1).

**I urge this review to recommend that the experience rating review be expanded to include consideration of the impact of the current experience rating system on the potential for under reporting and the resulting compromise to worker entitlement to compensation and equity for employers who fully report their claims.**

In my 2013 Report to the Manitoba Minister of labor I recommended that the first two weeks of anytime loss claims be assigned to the employer's industry sector to be funded collectively by that sector out of the accident fund. The purpose of that recommendation was to take the pressure off employers while they arranged for

[12] Ibid. P. 18

suitable light duties to facilitate an early return to work. This proposal would provide assistance to smaller and medium-size employers who don't always have the resources to immediately find productive and safe light-duty options. This approach would also minimize the temptation to place injured workers in nonproductive and sometimes demeaning positions.

**I encourage this review to recommend that the above noted experience rating review also include consideration of this option in the experience rating review.**

*Protections against claims suppression*

In my 2018 report I recommended that the Board of Directors consider initiating an independent scientific review to determine of the nature and extent of claims suppression in the BC workers compensation system. In late 2018 the Board awarded a contract to investigate the extent and nature of claim suppression in BC to the Institute of Work and Health. The results of that study will be available in mid 2020.

The "Historic Compromise" established entitlement to workers compensation as a statutory right under the legislation. This right was expressed by Mr. Justice Tysoe in his 1966 Report in the following terms:

> These benefits are not granted as a matter of grace, but of right. There is no matter of charity about them. They have been acquired by the workers as a body in return for giving up such common-law rights as they might have against employers.[13]

In order to maintain confidence in the workers compensation system it is imperative that policies that impinge on or inhibit the exercise of this right must be identified and removed and employer practices that discourage or prevent a worker from filing a claim must be identified and eliminated.

Suppression of claims is addressed in section 177 of part 3 of the Act which deals with occupational health and safety matters. It is not clear why the prohibition against claims suppression previously contained in section 14 in Part I of the Act relating to compensation matters was moved to Part III of the Act relating to occupational health and safety issues.

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[13] Tysoe, P. 19

In my 2018 report to the Board of directors I recommended that the Board of Directors amend policy #94.20 regarding the enforcement of section 177 of the Act with respect to claims suppression. On the basis of a number of WCAT decisions[14] the remedies under section 151 of Part 3 are not available to a worker who has been fired for claims suppression unless the claim involves an occupational health and safety issue. This limitation appears to undermine the prohibitions in section 177 of the Act and the protection in Section 151 of the Act.

Restoring the prohibition against claims suppression in Part I of the Act dealing with compensation claims issues with sufficient enforcement provisions would effectively remove this gap in worker protection and would help restore the confidence of worker regarding the unfettered right to file a claim with the Board. Such a provision should prohibit an employer from taking any action in respect of a worker with the intent of discouraging or preventing the worker from filing a claim or influencing or inducing the worker to withdraw or abandon a claim for compensation including:

- dismissing or threatening to dismiss a worker
- disciplining or suspending or threatening to discipline or suspend a worker
- imposing a penalty on a worker
- directly or indirectly intimidating or coercing a worker with threats, promises, persuasion or other means.

Such a provision should be accompanied by a process for applying an administrative penalty sufficient to prevent claims suppression.

**I encourage this review to recommend to the Minister that the Act be amended to provide a clear provision in Part I of the Act prohibiting claims suppression with a sufficient enforcement mechanism to prevent such suppression.**

*Fair adjudication practices*

A large majority of the claims filed with the WCB involve straightforward, uncontested injuries that are for the most part processed routinely without complications or difficulty for the worker. Most workers who suffer an injury on the job file a claim for compensation, get medical treatment and return to work usually without complications. However, a significant proportion of the claims for injured and disabled workers do not follow this routine recovery path.

[14] for example see WCAT noteworthy decision 2015-03765, most recently endorsed in January 2019 in WCAT Decision Number: A1801700

Research cited in the Journal of Occupational Medicine estimates that eighty percent of workers' compensation claim costs are taken up by the twenty percent of workers on complex and longer-term claims. In a recent paper workers compensation specialist Andy King documents the drive to reduce benefit entitlement and the cost-cutting agenda in the workers compensation system and its impact on seriously injured workers.

Earlier this year, I provided a report to the BC Workers Compensation Board of Directors documenting the cost-cutting agenda in BC following the introduction of Bill 49 in 2002. Research from the Institute of Work and Health showed that the greatest impact of those changes was on older injured workers with severe injuries and permanent disabilities.

In a 2009 research report[15] to the Ontario WSIB Joan Eakin and others documented how front line workers at the WSIB see employers and workers through different lens:

> "Employers are associated with revenue, injured workers with costs."

Eakin and her colleagues also document how the cost-cutting agenda permeated the adjudication process and "might be playing a role in stigmatization of injured workers."

Ellen MacEachen and her colleagues studied workers with complex and extended compensation claims who failed to return to work as expected.[16] Their findings indicate that:

> "Bureaucratic system problems…appeared to have a damaging effect on workers in the form of a "toxic dose" affecting the worker beyond the initial injury"

The common phrase "adding insult to injury" sums it up from the worker's perspective.

Perhaps the most damaging impact of the doubt and denial that often accompanies these complex and contentious claims is the toll it takes on the worker's mental health

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[15] Joan Eakin, Ellen MacEachen, Elizabeth Mansfield & Judy Clarke, "The Logic of Practice: An Ethnographic Study of Front-line Service Work with Small Businesses in Ontario's Workplace Safety and Insurance Board"

[16] Journal of Occupational Rehabilitation
September 2010, Volume 20, Issue 3, pp 349–366 | Cite as
The "Toxic Dose" of System Problems: Why Some Injured Workers Don't Return to Work as Expected

and self esteem. In some cases injured workers experience this as a challenge to their self identity and personal self worth. This can lead to depression and worse.

Professor Katherine Lippel, Canada's Research Chair in Occupational Health and Safety Law has written extensively on the importance of respecting the dignity of the injured worker. She counsel's that the compensation system must:

> "…be predicated on respect for claimant dignity, fairness and justice, and on the avoidance of stigmatization if a system is to better serve those who were injured.[17]

The path to recovery for the complex and contentious cases that negatively impacts a worker's self esteem and sense of identity must be carried out with recognition of the challenges that the worker faces and this engagement must be pursued in a way that respects the worker's sense of fairness and personal integrity.

Unfortunately, in my position as a vice-chair with the Workers Compensation Appeal Tribunal I witnessed an increasing trend of seriously injured workers caught up in the increasing complex and bureaucratic processes with their WCB claims that reflected the "toxic dose" negatively impacting their recovery process. In my September 2013 letter of resignation to the Tribunal chair I advised:

> I have a growing concern that the changes introduced into the Worker's Compensation system in the last decade erode the integrity of the historic compromise that is the foundation of a fair and equitable compensation system. The decision-making process is becoming increasingly complex. The onus to seek decisions on many issues properly before the Board has shifted to the worker, rather than the Board exercising their inquiry and adjudicative responsibility under the act.
>
> This increasing complexity and complications in the decision-making process is, in my view, fostering a non-therapeutic impact on too many workers forcing many of them into a somewhat legalistic appeal system where expensive representation is often required. The dramatic increase in suicide risk is just one indicator of the impact of the decision-making process on vulnerable workers.

[17] Prof. Kathrine Lippel, "Preserving workers' dignity in workers' compensation systems: an international perspective. , *Am Jn Ind Med*, 2012

Following my early retirement from the Appeal Tribunal I under took some work in disability prevention and management with the Pacific University for Workplace HealthSciences, an internationally recognized leader in disability management. While involved with that program I had an opportunity to assist a severely injured worker who was encountering significant difficulties in navigating his claim through the bureaucratic decision making process and appeals system.

This worker's 2010 life threatening accident resulted significant physical and psychological injuries and permanent impairments that in my view should have attracted a compassionate approach from the Board with the administration of his claim. Instead he encountered an adjudication process that did not investigate all of his injuries, pressured him to return to work prematurely against his physicians' recommendation, and forced him into a seven year non-therapeutic battle through the appeals process to gain full and fair recognition of the permanent disabilities resulting from his compensable injuries.

Based on my experience as an appeals adjudicator prior to my early retirement, this worker's experience is consistent with that of many other injured workers, particularly since the legislative changes to the Act in 2002 and the administrative changes to the worker's compensation system implementing those changes including the introduction of Board's computerized case management system. I have provided a detailed summary of this worker's difficult experience in Appendix A to illustrate this point.

In my 2018 Report to the Board of Directors of the WCB I addressed at some length the issue of fairness in the decision making process with particular attention to section 99 of the Act and the 2002 legislative change that introduced the application of "binding" policy over the merits and justice of the individual case. That legislative change compromised the basic fairness principle that required the Board to make its decision in accordance with the merits and justice of the case first established in the Act in 1918.

Board policy #2.20 made it clear that binding policy was paramount over the merits and justice of the case. That policy issue is currently under review by the Board. I did not have the latitude in my 2018 report to address the provisions of the *Act* and limited my recommendations regarding section 99 of the *Act* to policy considerations under policy #2.20.

I believe the current review does have the jurisdiction to address legislative issues that would increase confidence of workers and employers in the workers' compensation system. The failure to fully and fairly consider the merits and justice of the individual

case has, based on my experience, significantly eroded the confidence of workers in the adjudication process.

While it is important for the Board to exercise its authority to establish policy that promotes consistency in the decision making process, it is my view that fairness in the decision making process requires that the application of policy must not result in decisions that are contrary to the merits and justice of the individual case. This principle was articulated in the pre-2002 claims policy #96.10 that indicated:

> …there is the obligation on the Board to decide each case in accordance with its merits and justice and the right of individual persons affected under the rules of nature justice to present argument and evidence on their own behalf. Therefore, regard must always be had to the particular circumstances of each claim to determine whether an existing policy should be applied or whether there are grounds for a change in or departure from a policy.

In my view the application of Board policy must be established under section 99 as "directive" and not "binding" and that the adjudication process must take into consideration the circumstances of the individual case and the final decision be made in accordance with the merits and justice of that case so long as that decision is permissible within the scope of the Act.

**I urge this review to recommend the Minister consider amending the *Act* to ensure that the application of published policy under section 99 be directive and not binding to the exclusion of the merits and justice of the case.**

*Fair Practices Office*

What was particularly frustrating for the worker whose case I have described in appendix A is that when the Board's stance became adversarial, there was no recourse available for him to get his claim back on track. The lengthy delays in the appeals process provided a final path to seeking a resolution, but the resulting delays took an enormous toll on him. Many workers who encounter a "hard line" approach by the Board when a claim does not fit neatly in their established algorithms simply abandon the claim, particularly if they are unrepresented. Vulnerable workers including those with psychological or language challenges are particularly at risk losing the entitlement they are due under the Act. This poses the risk of bureaucratic claims suppression.

The Workers Advisors Office plays an important role in advising and sometimes assisting injured workers navigate their claims, but because of the volume of cases requiring assistance and the limitations on their resources, they are not in my view capable of meeting the growing need of direct representation in the wide range of cases. My efforts to engage the Board's Fair Practices Office on behalf of the worker in the case study was unhelpful. That office reports to the chief review officer of the Board's Review Division and does not provide advice on issues under review or appeal. I did access the Officer of the Provincial Ombudsperson in the case study but found they had a limited capacity to address complex issues in a timely manner.

The Alberta government recently introduced changes to their *Workers Compensation Act* under sections 23.1-6 of the Act to establish a Fair Practices Office independent of the Workers Compensation Board. The Fair Practices Commissioner has the authority to make recommendations to the Board, the Appeals Commission or Medical Panels Office on any matter under their *Act*, for the purpose of determining administrative fairness and processes used to reach decisions. That office also has the authority to address complaints by a worker, a workers dependant or an employer. The commissioner may also review and make recommendations on a matter referred to it by the Board, the Appeals Commission or on the commissioner's own motion.

The Alberta Fair Practices Office assists in navigating the workers compensation system and may provide advice and advocacy and can help with appealing a claim including representation in the appeal. The Fair Practices Office can provide oversight on the decision making process to ensure fairness. They can also hold the Board accountable for following its Code of Rights and Conduct. The establishment of such an independent office in BC along with a Code of Rights and Conduct would go a long way to increasing confidence of workers and employers in the BC workers' compensation system.

**I urge this review to recommend to the Minister that the Act be amended to establish a Fair Practices Office along the lines of the one established recently in Alberta.**

*Medical evidence and medical disputes*

Medical evidence plays a key role in the adjudication process and Board decisions often are based on the available medical evidence. Acceptance of a claim in the first instance is usually dependent on medical evidence of a disability and a connection of that

disability to the worker's employment. Medical evidence also often determines the nature and duration of compensation benefits.

On the basis of my experience in the compensation appeals system I witnessed a large volume of appeals advanced on the basis of disputed medical evidence. Often workers viewed the involvement of Board doctors as supporting the Board's decisions rather than making independent and objective medical assessments. Employers sometimes expressed concerns that the medical evidence provided by worker's physicians advocated the worker's position. Medicine is not an exact science and honest differences often exist among doctors on a similar set of facts. To put it simply, medical disputes are inherent in the workers compensation system.

The resolution of medical disputes are most often resolved in costly and time consuming appeals and even then the implementation of the of the appellate decision is sometimes clouded by ongoing medical disputes as illustrated in the case study in Appendix A. There is a compelling need for a mechanism in the workers compensation system to resolve medical disputes without engaging time consuming and adversarial appeal processes.

The Alberta Government has recently established a Medical Panels Office under section 46.2 of their Act independent of the Board and headed by a Medical Panels Commissioner. The Commissioner is empowered to convene a medical panel at the request of the Board or the Appeals Commission. The panel process may also be initiated by a worker through the Appeal Commission. The Medical Panel’s decision is binding for all of the parties involved in the claim. The Medical Appeals Office is currently piloting an appeals conference that provides an informal dispute resolution process to facilitate resolution of medical matters prior to holding a Medical Panel

The Medical Appeals Office also coordinates independent medical exams (IME) where the worker gets to choose the examining physician from a roster with appropriate medical specialities. The process is expedited with the choice of physician made within 3 days and the exam carried out within 2 weeks. The IME is usually a one-time assessment and a copy of the exam is sent to the worker, his or her physician and the Board. The Board requests an IME when they need an objective, third-party, expert medical opinion. This process would be most effective if it included provision for the worker's physician to initiate an IME where an outstanding adjudication issue would benefit from an objective, third party, expert medical opinion.

**I urge this review to recommend an independent medical panels process to resolve outstanding medical disputes and to provide for expedited independent medical exams by a physician selected by the worker being examined.**

The current adjudication process used by the Board is driven by the adjudication of specific diagnoses which results in an over medicalization of the adjudication process. The expected duration of recovery for particular diagnoses often triggers adjudicative decisions. The approach lends itself to a computerized policy driven process that does not consider the circumstances of the individual case or the worker as a whole person.

As illustrated in the case study in Appendix A, this focus on specific diagnoses, particularly with complex cases involving multiple injuries, can lead to a piecemeal adjudication process resulting in multiple overlapping appeals. All too often the decision maker will focus on one aspect of the claim to the exclusion of other relevant and related considerations. This can lead to unaddressed issues and incomplete adjudication. When a worker seeks a review of "the whole claim" he or she is advised that only the issues specifically mentioned in the decision may be considered and the worker is directed to return to the Board to get a new decision on the un-adjudicated matter. This leads to a confusing, time consuming and often non-therapeutic process that is harmful to the worker's well-being.

Under the previous Workers Compensation Appeal Division the former Chief Appeal Commissioner established a process of "remedial jurisdiction" where the appeal panel would take jurisdiction of an un-adjudicated matter that was squarely before the initial decision maker, where there was sufficient evidence to arrive at a decision with confidence and no party to the appeal would be prejudiced by the resolution of the outstanding issue. As pointed out by the former Chief Appeal Commissioner in a reported decision:

> There is ample judicial authority for the proposition that workers' compensation legislation is to be regarded as remedial legislation and interpreted liberally and non-technically to facilitate the expeditious and fair handling of injured workers' claims.

**I urge this review to endorse the remedial jurisdiction principle to provide for a more wholistic approach to the appeals process in appropriate circumstances to avoid the "appeals merry-go-round" that now occurs in too many cases.**

*Reconsideration of decisions*

Another area where worker and employer confidence in the system can be enhanced is on the reopening of claims where significant new evidence not previously available is discovered that indicates that the merits and justice of the case indicates the decision should be reopened and reconsidered. Section 96(2) of the Act now restricts reopening of a claim where there is a significant change in the worker's medical condition or a recurrence of the injury. This restrictive approach results in an injustice in some cases and a return to the pre-2002 legislative provision would provide a greater measure of fairness in the system.

**I urge this review to recommend to the Minister that the Act be amended to restore the flexibility for reopening and reconsideration consistent with the pre-2002 section 96(2) of the Act.**

**II. Recovery and Return to Work**

The BC workers compensation system provides the foundation for protecting injured workers from the risks of work related injury and disease in the workplace. The priority of prevention was well articulated by Mr. Justice Tysoe in his 1966 Commission of Inquiry into the Workers Compensation Act:

> The prime mission of those who administer workmen's compensation and the prime purpose of the Act is not to furnish financial benefits, but to promote and encourage measures for the prevention of injury to workmen in the course of their work and, should any be so unfortunate as to become disabled as a result of such injury, means for the rehabilitation and return to useful employment as soon as possible. To keep work-connected injuries to a minimum is the first object. Restoration of injured workmen physically and economically is the second.…[18]

Restoring an injured worker to suitable employment with the injury employer at the level of his or her pre-injury earnings is at the heart of a worker centred approach and a cornerstone of the workers compensation system. There are several levels available to achieve a workplace culture that restores injured workers to safe, productive and durable employment following disablement due to a workplace accident or disease.

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18 Mr. Justice Charles W. Tysoe Commission of Inquiry Workmen's Compensation Act, 1966.Available at: https://www.wcat.bc.ca/research/WorkSafeBC/WSBC_Hist_Rpt/1966-tysoe-report.pdf

*Legislative protections*

It is well established in Canada that enshrining the obligation to re-employ and the duty to accommodate injured workers as a right in legislation provides the soundest foundation for restoring injured workers to safe, productive and durable employment. British Columbia is the only province in Canada where there is no legislative requirement in the act for employers to rehire injured workers. In my view, the time is long overdue to close this gap. The legislation in other jurisdictions provides a model for enacting a duty to accommodate provision in the *BC Workers Compensation Act*.

For example, sections 41 of the Ontario *Workers Safety and Insurance Act* provides a streamline provision establishing the employer's obligation to re-employ and duty to accommodate the worker to the extent that the accommodation does not cause the employer undue hardship. The Ontario *Act* limits this obligation and duty to workplaces with 20 or more workers and excludes some categories of workers where this protection is not practicable. The duration of the obligation to re-employ is set at either two years from the date of injury, one year after the worker is medically able to perform the essential duties of his or her pre-injury employment, and the date at which the worker reaches age 65 (whichever is earliest). The Ontario provision provides an enforcement mechanism for employers who fail to comply with the provision and protection for the worker against termination related to the injury.

Section 42 of the Ontario Act requires the Board to provide the worker with a "labour market assessment" where reemployment with the injury employer is unlikely because of the injury or if the employer is not cooperating in the early and safe return to work. Based on the results of the assessment the Board is required to decide if the worker requires "a labour market re-entry plan" to reduce or eliminate the loss of earnings that may result from the injury. That plan must be prepared in consultation with the worker and the worker's health practitioners where necessary. The Board is responsible for paying for the plan and the worker is required to cooperate with the plan.

These provisions provide a clear roadmap for ensuring a foundation for restoring injured workers to a safe, productive and durable return to the workforce without a loss of earnings where possible.

**I urge this review to recommend to the Minister that the BC Act be amended to establish an obligation to re-employ and a duty to accommodate an injured worker with similar protections and to include a provision for a right to rehabilitation.**

*Qualified expertise*

Restoring injured worker to productive employment in today's economic climate with the changing demographics in the workforce present particular challenges to workers, employers and to the Board.[19] The Canadian population is aging, with the proportion of people 65 years of age and over expected to double in the next 25 years. Given the challenges for reemploying injured workers in an evolving economy where job security is becoming more tenuous requires a level of expertise at both the workplace level and at the Board.

The days of hiring generalists with little or no training in disability prevention and disability management to redirect workers to reemployment opportunities through a job search program are fading fast in the current economy. Trained expertise in the principles and practice of disability management provides the best return on investment in return to work programs.

The Enhanced Disability Management Program (EDMP) in the BC health care sector provides customized support and services to address medical, personal, workplace and vocational issues that keep workers from fully engaging in the workplace. Each plan is customized and may include access to diagnostic services or treatments not covered by MSP or extended health plans; and return-to-work options such as temporary assignments, flexible work, duty modifications, or alternate/sedentary work. Key to the success of the EDMP program is the commitment to provide disability management expertise with certified evidenced based training being emphasized both at the union and employer level.

BC's National Institute for Disability Management and Research (NIDMAR) is an internationally recognized leader in providing training and certification for disability management specialists including Certified Disability Management Professionals (CDMP) and Certified Return to Work Coordinators (CRTWC).

The Ontario WSIB has recently created a renewed return to work strategy that is part of a new customer-centric service model. Evie DoCouto head of the WSIB's Return to

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[19] For example see: "Implications of an aging workforce for work injury, recovery, returning to work and remaining at work" by Dwayne Van Eerd, Peter Smith and Uyen Vu in OOHNA JOURNAL, SPRING/SUMMER 2019, pp. 30-36.
https://www.iwh.on.ca/sites/iwh/files/oohna_journal_fw_2019_agingrtw.pdf

Work Program has committed to invest in improved training for Return-to-Work Specialists in achieving the Certified Disability Management Professional (CDMP) and Certified Return to Work Coordinator (CRTWC) designations. She stated: "These designations will help our staff to handle the greater case complexity we are seeing as a result of an increase in mental stress and mild traumatic brain injury referrals."[20]

A key to improving return to work opportunities for injured workers in BC is to increase the number of the Board's vocational rehabilitation staff and to promote specialized training and certification of that staff so the Board has the capacity for increased early intervention and the expertise to assist the more complex cases in today's evolving economy.

**I encourage this review to recommend that the Board increase both vocational rehabilitation staffing levels and support increased training and professional certification of existing staff.**

*Return to work incentives*

The issue of return to work incentives is gaining increased attention in Canada. The Ontario Institute for Work and Health recently reported the commencement of a federally funded research project to produce guidelines and resources for policy-makers, employment service providers, employers and persons with disabilities on financial incentives for employing persons with disabilities.

BC employers are also coping with the challenge of restoring injured workers to suitable employment and will also benefit from developing increased expertise in their return to work programs. Earlier this year WorkSafeBC partnered with the Pacific Coast University for Workplace Health Sciences (PCU-WHS) to launch a two-year pilot project designed to encourage and support students pursuing a career in disability management. This $150,000 per year commitment will allow up to 25 students to enter the Bachelor of Disability Management degree program at PCU-WHS. This initiative will enhance opportunities for employer and labour organizations to increase their expertise in disability prevention and management.

It is well established that fair and effective disability management programs at the workplace level provide an important vehicle for restoring injured workers to safe and

[20] Changes coming to WSIB's Return to Work Program International Disability Management Standards Council.

productive employment in a timely manner. Some employers have developed effective disability management programs to the benefit of their workforce, with the advantage of achieving reduced costs associated with disablement from work. The National Institute for Disability Management and Research has developed a Consensus Based Disability Management Audit designed to evaluate the effective implementation of workplace disability management programs.[21]

The board previously had a disability management audit program but suspended that program in 2013 to work on a more effective program audit tool. To date that program has not been revised.

**I recommend that this review recommend that the Board explore the option of implementing a disability management incentive program based on an effective audit tool to stimulate the development and recognition of more effective disability management programs in BC workplaces.**

In my 2018 report to the Board of Directors I recommended a range of policy changes to improve the Board's vocational rehabilitation and return to work policies. Those recommendations are currently under review at the Board and I need not comment further on them at this time.

## Conclusion

This review has the opportunity and challenge to identify measures to restore a greater degree of integrity to the workers compensation system. The confidence of the workplace partners in the workers compensation system is essential if the balance of the historic compromise is to be maintained. This review provides an important opportunity to restore the balance that has been eroded over the last 16 years. A periodic review of the act where are the parties can renew and restore their commitment to the historic compromise is an important step in maintaining a system that has the confidence of employers, workers and their representatives.

Thank you for the opportunity to present my reviews to this important review.

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[21]Consensus Based Disability Manage Audit https://www.nidmar.ca/audit/executive_summary.PDF

Paul Petrie
July 11, 2019
Victoria, BC

Presented at public hearing to reviewer Janet Patterson