# GENERAL SERVICE AGREEMENT

BRITISH COLUMBIA

| *For Administrative Purposes Only* | |
|---|---|
| *Ministry Contract No.:* ***C19WCA-01***<br>*Requisition No.:* _____<br>*Solicitation No.(if applicable):* _____<br>*Commodity Code:* _____<br><br>***Contractor Information***<br><br>*Supplier Name:* ***Janet K. Patterson***<br>*Supplier No.:* _____<br>*Telephone No.:* ***604-831-5654***<br>*E-mail Address:* s.22<br>*Website:* _____ | ***Financial Information***<br><br>*Client:* ***127***<br>*Responsibility Centre:* ***51745***<br>*Service Line:* ***52200***<br>*STOB:* ***6001/6002***<br>*Project:* ***5155555***<br><br>***Template version:*** *December 21, 2018* |

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THIS AGREEMENT is dated for reference the ___day of **April, 2019**.

BETWEEN:

**Janet K. Patterson** (the "Contractor") with the following specified address:
#201 – 3701 Hastings Street
Burnaby, BC
V5C 2H6

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, as represented by **Trevor Hughes,** Deputy Minister, Ministry of Labour (the "Province") with the following specified address:
2nd floor, 634 Humboldt Street
Victoria, BC
V8W 9K4

The Province wishes to retain the Contractor to provide the services specified in Schedule A and, in consideration for the remuneration set out in Schedule B, the Contractor has agreed to provide those services, on the terms and conditions set out in this Agreement.

As a result, the Province and the Contractor agree as follows:

## 1 DEFINITIONS

General

1.1 In this Agreement, unless the context otherwise requires:

(a) "Business Day" means a day, other than a Saturday or Sunday, on which Provincial government offices are open for normal business in British Columbia;

(b) "Incorporated Material" means any material in existence prior to the start of the Term or developed independently of this Agreement, and that is incorporated or embedded in the Produced Material by the Contractor or a Subcontractor;

(c) "Material" means the Produced Material and the Received Material;

(d) "Produced Material" means records, software and other material, whether complete or not, that, as a result of this Agreement, are produced or provided by the Contractor or a Subcontractor and includes the Incorporated Material;

(e) "Received Material" means records, software and other material, whether complete or not, that, as a result of this Agreement, are received by the Contractor or a Subcontractor from the Province or any other person;

(f) "Services" means the services described in Part 2 of Schedule A;

(g) "Subcontractor" means a person described in paragraph (a) or (b) of section 13.4; and

(h) "Term" means the term of the Agreement described in Part 1 of Schedule A subject to that term ending earlier in accordance with this Agreement.

Meaning of "record"

1.2 The definition of "record" in the *Interpretation Act* is incorporated into this Agreement and "records" will bear a corresponding meaning.

## 2 SERVICES

Provision of services

2.1 The Contractor must provide the Services in accordance with this Agreement.

Term

2.2 Regardless of the date of execution or delivery of this Agreement, the Contractor must provide the Services during the Term.

Supply of various items

2.3 Unless the parties otherwise agree in writing, and except for items set out in paragraphs (a) and (b) of this section, the Contractor must supply and pay for all labour, materials, equipment, tools, facilities, approvals and licenses necessary or advisable to perform the Contractor's obligations under this Agreement, including the license under section 6.4.

(a) The Province agrees to supply support for making travel arrangements, support for arranging venues for consultations with the workers' compensation system stakeholders required as part of the Services, making necessary security arrangements with the venues for those public consultations, and office space for the Contractor, the location and nature of such office space to be determined at the sole discretion of the Province.

(b) The Province will provide, to a maximum cost of $100,000, legal counsel acting on behalf of the Attorney General to provide legal advice in relation to the Services. All such advice will remain strictly confidential and subject to privilege and the Contractor must take all necessary steps to maintain confidentiality and privilege. Any necessary retainer agreement, hourly rate payable and maximum amount payable to legal counsel will be at the sole discretion of the Province. In any event the maximum cost of legal counsel provided by the Province will not exceed $100,000.

Standard of care

2.4 Unless otherwise specified in this Agreement, the Contractor must perform the Services to a standard of care, skill and diligence maintained by persons providing, on a commercial basis, services similar to the Services.

Standards in relation to persons performing Services

2.5 The Contractor must ensure that all persons employed or retained to perform the Services are qualified and competent to perform them and are properly trained, instructed and supervised. The Contractor is not responsible for ensuring the qualifications, competence, training, instruction or supervision of any staff employed or retained by the Province to supply support in accordance with section 2.3(a) and (b).

Instructions by Province

2.6 The Province may from time to time give the Contractor reasonable instructions which are not intended to and will not impact the independence of the contractor in carrying out the responsibilities under the contract (in writing or otherwise) as to the performance of the Services. The Contractor must comply with those instructions but, unless otherwise specified in this Agreement, the Contractor may determine the manner in which the instructions are carried out.

Confirmation of non-written instructions

2.7 If the Province provides an instruction under section 2.6 other than in writing, the Contractor may request that the instruction be confirmed by the Province in writing, which request the Province must comply with as soon as it is reasonably practicable to do so.

Effectiveness of non-written instructions

2.8 Requesting written confirmation of an instruction under section 2.7 does not relieve the Contractor from complying with the instruction at the time the instruction was given.

Applicable laws

2.9 In the performance of the Contractor's obligations under this Agreement, the Contractor must comply with all applicable laws.

## 3 PAYMENT

Fees and expenses

3.1 If the Contractor complies with this Agreement, then the Province must pay to the Contractor at the times and on the conditions set out in Schedule B:

(a) the fees described in that Schedule;

(b) the expenses, if any, described in that Schedule if they are supported, where applicable, by proper receipts and, in the Province's opinion, are necessarily incurred by the Contractor in providing the Services; and

(c) any applicable taxes payable by the Province under law or agreement with the relevant taxation authorities on the fees and expenses described in paragraphs (a) and (b).

The Province is not obliged to pay to the Contractor more than the "Maximum Amount" specified in Schedule B on account of fees and expenses.

Statements of accounts

3.2 In order to obtain payment of any fees and expenses under this Agreement, the Contractor must submit to the Province a written statement of account in a form satisfactory to the Province upon completion of the Services or at other times described in Schedule B.

Withholding of amounts

3.3 Without limiting section 9.1, the Province may withhold from any payment due to the Contractor an amount sufficient to indemnify, in whole or in part, the Province and its employees and agents against any liens or other third-party claims that have arisen or could arise in connection with the provision of the Services. An amount withheld under this section must be promptly paid by the Province to the Contractor upon the basis for withholding the amount having been fully resolved to the satisfaction of the Province.

Appropriation

3.4 The Province's obligation to pay money to the Contractor is subject to the *Financial Administration Act*, which makes that obligation subject to an appropriation being available in the fiscal year of the Province during which payment becomes due.

Currency

3.5 Unless otherwise specified in this Agreement, all references to money are to Canadian dollars.

Non-resident income tax

3.6 If the Contractor is not a resident in Canada, the Contractor acknowledges that the Province may be required by law to withhold income tax from the fees described in Schedule B and then to remit that tax to the Receiver General of Canada on the Contractor's behalf.

Prohibition against committing money

3.7 Without limiting section 13.10(a), the Contractor must not in relation to performing the Contractor's obligations under this Agreement commit or purport to commit the Province to pay any money except as may be expressly provided for in this Agreement.

Refunds of taxes

3.8 The Contractor must:

(a) apply for, and use reasonable efforts to obtain, any available refund, credit, rebate or remission of federal, provincial or other tax or duty imposed on the Contractor as a result of this Agreement that the Province has paid or reimbursed to the Contractor or agreed to pay or reimburse to the Contractor under this Agreement; and

(b) immediately on receiving, or being credited with, any amount applied for under paragraph (a), remit that amount to the Province.

## 4 REPRESENTATIONS AND WARRANTIES

4.1 As at the date this Agreement is executed and delivered by, or on behalf of, the parties, the Contractor represents and warrants to the Province as follows:

(a) except to the extent the Contractor has previously disclosed otherwise in writing to the Province,

(i) all information, statements, documents and reports furnished or submitted by the Contractor to the Province in connection with this Agreement (including as part of any competitive process resulting in this Agreement being entered into) are in all material respects true and correct,

(ii) the Contractor has sufficient trained staff, facilities, materials, appropriate equipment and approved subcontractual or other agreements in place and available to enable the Contractor to fully perform the Services and to grant any licenses under this Agreement, and

(iii) the Contractor holds all permits, licenses, approvals and statutory authorities issued by any government or government agency that are necessary for the performance of the Contractor's obligations under this Agreement; and

(b) if the Contractor is not an individual,

(i) the Contractor has the power and capacity to enter into this Agreement and to observe, perform and comply with the terms of this Agreement and all necessary corporate or other proceedings have been taken and done to authorize the execution and delivery of this Agreement by, or on behalf of, the Contractor, and

(ii) this Agreement has been legally and properly executed by, or on behalf of, the Contractor and is legally binding upon and enforceable against the Contractor in accordance with its terms except as enforcement may be limited by bankruptcy, insolvency or other laws affecting the rights of creditors generally and except that equitable remedies may be granted only in the discretion of a court of competent jurisdiction.

## 5 PRIVACY, SECURITY AND CONFIDENTIALITY

Privacy

5.1 The Contractor must comply with the Privacy Protection Schedule attached as Schedule E.

Security

5.2 The Contractor must:

(a) make reasonable security arrangements to protect the Material from unauthorized access, collection, use, disclosure, alteration or disposal; and

(b) comply with the Security Schedule attached as Schedule G.

Confidentiality

5.3 The Contractor must treat as confidential all information in the Material and all other information accessed or obtained by the Contractor or a Subcontractor (whether verbally, electronically or otherwise) as a result of this Agreement, and not permit its disclosure or use without the Province's prior written consent, which consent will not be unreasonably withheld, except:

(a) as required to perform the Contractor's obligations under this Agreement or to comply with applicable laws;

(b) if it is information that is generally known to the public other than as result of a breach of this Agreement; or

(c) if it is information in any Incorporated Material.

Public announcements

5.4 Any public announcement relating to this Agreement will be arranged by the Province and, if such consultation is reasonably practicable, after consultation with the Contractor.

Restrictions on promotion

5.5 The Contractor must not, without the prior written approval of the Province, refer for promotional purposes to the Province being a customer of the Contractor or the Province having entered into this Agreement.

## 6 MATERIAL AND INTELLECTUAL PROPERTY

Access to Material

6.1 If the Contractor receives a request for access to any of the Material from a person other than the Province, and this Agreement does not require or authorize the Contractor to provide that access, the Contractor must promptly advise the person to make the request to the Province.

Ownership and delivery of Material

6.2 The Province exclusively owns all property rights in the Material which are not intellectual property rights. The Contractor must deliver any Material to the Province immediately upon the Province's request.

Matters respecting intellectual property

6.3 The Province exclusively owns all intellectual property rights, including copyright, in:

(a) Received Material that the Contractor receives from the Province; and

(b) Produced Material, other than any Incorporated Material.

Upon the Province's request, the Contractor must deliver to the Province documents satisfactory to the Province that irrevocably waive in the Province's favour any moral rights which the Contractor (or employees of the Contractor) or a Subcontractor (or employees of a Subcontractor) may have in the Produced Material and that confirm the vesting in the Province of the copyright in the Produced Material, other than any Incorporated Material.

Rights in relation to Incorporated Material

6.4 Upon any Incorporated Material being embedded or incorporated in the Produced Material and to the extent that it remains so embedded or incorporated, the Contractor grants to the Province:

(a) a non-exclusive, perpetual, irrevocable, royalty-free, worldwide license to exercise, in respect of that Incorporated Material, the rights set out in the *Copyright Act* (Canada), including the right to use, reproduce, modify, publish and distribute that Incorporated Material; and

(b) the right to sublicense or assign to third-parties any or all of the rights granted to the Province under section 6.4(a).

## 7 RECORDS AND REPORTS

Work reporting

7.1 Upon the Province's request, the Contractor must fully inform the Province of all work done by the Contractor or a Subcontractor in connection with providing the Services.

Time and expense records

7.2 If Schedule B provides for the Contractor to be paid fees at a daily or hourly rate or for the Contractor to be paid or reimbursed for expenses, the Contractor must maintain time records and books of account, invoices, receipts and vouchers of expenses in support of those payments, in form and content satisfactory to the Province. Unless otherwise specified in this Agreement, the Contractor must retain such documents for a period of not less than seven years after this Agreement ends.

## 8 AUDIT

8.1 In addition to any other rights of inspection the Province may have under statute or otherwise, the Province may at any reasonable time and on reasonable notice to the Contractor, enter on the Contractor's premises to inspect and, at the Province's discretion, copy any of the Material and the Contractor must permit, and provide reasonable assistance to, the exercise by the Province of the Province's rights under this section.

## 9 INDEMNITY AND INSURANCE

Indemnity

9.1 The Contractor must indemnify and save harmless the Province and the Province's employees and agents from any loss, claim (including any claim of infringement of third-party intellectual property rights), damage award, action, cause of action, cost or expense that the Province or any of the Province's employees or agents may sustain, incur, suffer or be put to at any time, either before or after this

Agreement ends, (each a "Loss") to the extent the Loss is directly or indirectly caused or contributed to by:

(a) any act or omission by the Contractor or by any of the Contractor's agents, employees, officers, directors or Subcontractors in connection with this Agreement; or

(b) any representation or warranty of the Contractor being or becoming untrue or incorrect.

Insurance

9.2 The Contractor must comply with the Insurance Schedule attached as Schedule D.

Workers compensation

9.3 Without limiting the generality of section 2.9, the Contractor must comply with, and must ensure that any Subcontractors comply with, all applicable occupational health and safety laws in relation to the performance of the Contractor's obligations under this Agreement, including the *Workers Compensation Act* in British Columbia or similar laws in other jurisdictions.

Personal optional protection

9.4 The Contractor must apply for and maintain personal optional protection insurance (consisting of income replacement and medical care coverage) during the Term at the Contractor's expense if:

(a) the Contractor is an individual or a partnership of individuals and does not have the benefit of mandatory workers compensation coverage under the *Workers Compensation Act* or similar laws in other jurisdictions; and

(b) such personal optional protection insurance is available for the Contractor from WorkSafeBC or other sources.

Evidence of coverage

9.5 Within 10 Business Days of being requested to do so by the Province, the Contractor must provide the Province with evidence of the Contractor's compliance with sections 9.3 and 9.4.

Legal Advice and Representation

9.6 The Province agrees that if the Contractor is a party to a proceeding, the involvement arises from the Contractor's performance of the Services, and the Contractor's conduct was not dishonest, malicious or otherwise in bad faith, the Province will provide legal advice and representation either through appointing legal counsel for the employee from Legal Services Branch, or appointing outside counsel for the employee and reimbursing the employee for, or paying, the fees, disbursement and other expenses of outside counsel. The decision to appoint legal counsel from Legal Services Branch or to appoint outside counsel will be at the sole discretion of the Province. For purposes of this section proceeding includes the following:

(a) a civil action against the Contractor;
(b) a defamation action against the Contractor;
(c) a human rights proceeding in which the Contractor is a respondent;
(d) an appeal from a proceeding in paragraphs (a) to (c);

## 10 FORCE MAJEURE

Definitions relating to force majeure

10.1 In this section and sections 10.2 and 10.3:

(a) "Event of Force Majeure" means one of the following events:

(i) a natural disaster, fire, flood, storm, epidemic or power failure,

(ii) a war (declared and undeclared), insurrection or act of terrorism or piracy,

(iii) a strike (including illegal work stoppage or slowdown) or lockout, or

(iv) a freight embargo

if the event prevents a party from performing the party's obligations in accordance with this Agreement and is beyond the reasonable control of that party; and

(b) "Affected Party" means a party prevented from performing the party's obligations in accordance with this Agreement by an Event of Force Majeure.

Consequence of Event of Force Majeure

10.2 An Affected Party is not liable to the other party for any failure or delay in the performance of the Affected Party's obligations under this Agreement resulting from an Event of Force Majeure and any time periods for the performance of such obligations are automatically extended for the duration of the Event of Force Majeure provided that the Affected Party complies with the requirements of section 10.3.

Duties of Affected Party

10.3 An Affected Party must promptly notify the other party in writing upon the occurrence of the Event of Force Majeure and make all reasonable efforts to prevent, control or limit the effect of the Event of Force Majeure so as to resume compliance with the Affected Party's obligations under this Agreement as soon as possible.

## 11 DEFAULT AND TERMINATION

Definitions relating to default and termination

11.1 In this section and sections 11.2 to 11.4:

(a) "Event of Default" means any of the following:

(i) an Insolvency Event,

(ii) the Contractor fails to perform any of the Contractor's obligations under this Agreement, or

(iii) any representation or warranty made by the Contractor in this Agreement is untrue or incorrect; and

(b) "Insolvency Event" means any of the following:

(i) an order is made, a resolution is passed or a petition is filed, for the Contractor's liquidation or winding up,

(ii) the Contractor commits an act of bankruptcy, makes an assignment for the benefit of the Contractor's creditors or otherwise acknowledges the Contractor's insolvency,

(iii) a bankruptcy petition is filed or presented against the Contractor or a proposal under the *Bankruptcy and Insolvency Act* (Canada) is made by the Contractor,

(iv) a compromise or arrangement is proposed in respect of the Contractor under the *Companies' Creditors Arrangement Act* (Canada),

(v) a receiver or receiver-manager is appointed for any of the Contractor's property, or

(vi) the Contractor ceases, in the Province's reasonable opinion, to carry on business as a going concern.

Province's options on default

11.2 On the happening of an Event of Default, or at any time thereafter, the Province may, at its option, elect to do any one or more of the following:

(a) by written notice to the Contractor, require that the Event of Default be remedied within a time period specified in the notice;

(b) pursue any remedy or take any other action available to it at law or in equity; or

(c) by written notice to the Contractor, terminate this Agreement with immediate effect or on a future date specified in the notice, subject to the expiration of any time period specified under section 11.2(a).

Delay not a waiver

11.3 No failure or delay on the part of the Province to exercise its rights in relation to an Event of Default will constitute a waiver by the Province of such rights.

Province's right to terminate other than for default

11.4 In addition to the Province's right to terminate this Agreement under section 11.2(c) on the happening of an Event of Default, the Province may terminate this Agreement for any reason by giving at least 10 days' written notice of termination to the Contractor.

Payment consequences of termination

11.5 Unless Schedule B otherwise provides, if the Province terminates this Agreement under section 11.4:

(a) the Province must, within 30 days of such termination, pay to the Contractor any unpaid portion of the fees and expenses described in Schedule B which corresponds with the portion of the Services that was completed to the Province's satisfaction before termination of this Agreement; and

(b) the Contractor must, within 30 days of such termination, repay to the Province any paid portion of the fees and expenses described in Schedule B which corresponds with the portion of the Services that the Province has notified the Contractor in writing was not completed to the Province's satisfaction before termination of this Agreement.

Discharge of liability

11.6 The payment by the Province of the amount described in section 11.5(a) discharges the Province from all liability to make payments to the Contractor under this Agreement.

Notice in relation to Events of Default

11.7 If the Contractor becomes aware that an Event of Default has occurred or anticipates that an Event of Default is likely to occur, the Contractor must promptly notify the Province of the particulars of the Event of Default or anticipated Event of Default. A notice under this section as to the occurrence of an Event of Default must also specify the steps the Contractor proposes to take to address, or prevent recurrence of, the Event of Default. A notice under this section as to an anticipated Event of Default must specify the steps the Contractor proposes to take to prevent the occurrence of the anticipated Event of Default.

## 12 DISPUTE RESOLUTION

Dispute resolution process

12.1 In the event of any dispute between the parties arising out of or in connection with this Agreement, the following dispute resolution process will apply unless the parties otherwise agree in writing:

(a) the parties must initially attempt to resolve the dispute through collaborative negotiation;

(b) if the dispute is not resolved through collaborative negotiation within 15 Business Days of the dispute arising, the parties must then attempt to resolve the dispute through mediation under the rules of the Mediate BC Society; and

(c) if the dispute is not resolved through mediation within 30 Business Days of the commencement of mediation, the dispute must be referred to and finally resolved by arbitration under the *Arbitration Act*.

Location of arbitration or mediation

12.2 Unless the parties otherwise agree in writing, an arbitration or mediation under section 12.1 will be held in Victoria, British Columbia.

Costs of mediation or arbitration

12.3 Unless the parties otherwise agree in writing or, in the case of an arbitration, the arbitrator otherwise orders, the parties must share equally the costs of a mediation or arbitration under section 12.1 other than those costs relating to the production of expert evidence or representation by counsel.

## 13 MISCELLANEOUS

Delivery of notices

13.1 Any notice contemplated by this Agreement, to be effective, must be in writing and delivered as follows:

(a) by fax to the addressee's fax number specified on the first page of this Agreement, in which case it will be deemed to be received on the day of transmittal unless transmitted after the normal business hours of the addressee or on a day that is not a Business Day, in which cases it will be deemed to be received on the next following Business Day;

(b) by hand to the addressee's address specified on the first page of this Agreement, in which case it will be deemed to be received on the day of its delivery; or

(c) by prepaid post to the addressee's address specified on the first page of this Agreement, in which case if mailed during any period when normal postal services prevail, it will be deemed to be received on the fifth Business Day after its mailing.

Change of address or fax number

13.2 Either party may from time to time give notice to the other party of a substitute address or fax number, which from the date such notice is given will supersede for purposes of section 13.1 any previous address or fax number specified for the party giving the notice.

Assignment

13.3 The Contractor must not assign any of the Contractor's rights or obligations under this Agreement without the Province's prior written consent. Upon providing written notice to the Contractor, the Province may assign to any person any of the Province's rights under this Agreement and may assign to any "government corporation", as defined in the *Financial Administration Act*, any of the Province's obligations under this Agreement.

Subcontracting

13.4 The Contractor must not subcontract any of the Contractor's obligations under this Agreement to any person without the Province's prior written consent, excepting persons listed in the attached Schedule C. No subcontract, whether consented to or not, relieves the Contractor from any obligations under this Agreement. The Contractor must ensure that:

(a) any person retained by the Contractor to perform obligations under this Agreement; and

(b) any person retained by a person described in paragraph (a) to perform those obligations

fully complies with this Agreement in performing the subcontracted obligations.

Waiver

13.5 A waiver of any term or breach of this Agreement is effective only if it is in writing and signed by, or on behalf of, the waiving party and is not a waiver of any other term or breach.

Modifications

13.6 No modification of this Agreement is effective unless it is in writing and signed by, or on behalf of, the parties.

Entire agreement

13.7 This Agreement (including any modification of it) constitutes the entire agreement between the parties as to performance of the Services.

Survival of certain provisions

13.8 Sections 2.9, 3.1 to 3.4, 3.7, 3.8, 5.1 to 5.5, 6.1 to 6.4, 7.1, 7.2, 8.1, 9.1, 9.2, 9.5, 10.1 to 10.3, 11.2, 11.3, 11.5, 11.6, 12.1 to 12.3, 13.1, 13.2, 13.8, and 13.10, any accrued but unpaid payment obligations, and any other sections of this Agreement (including schedules) which, by their terms or nature, are intended to survive the completion of the Services or termination of this Agreement, will continue in force indefinitely subject to any applicable limitation period prescribed by law, even after this Agreement ends.

Schedules

13.9 The schedules to this Agreement (including any appendices or other documents attached to, or incorporated by reference into, those schedules) are part of this Agreement.

Independent contractor

13.10 In relation to the performance of the Contractor's obligations under this Agreement, the Contractor is an independent contractor and not:

(a) an employee or partner of the Province; or

(b) an agent of the Province except as may be expressly provided for in this Agreement.

The Contractor must not act or purport to act contrary to this section.

Personnel not to be employees of Province

13.11 The Contractor must not do anything that would result in personnel hired or used by the Contractor or a Subcontractor in relation to providing the Services being considered employees of the Province.

Key Personnel

13.12 If one or more individuals are specified as "Key Personnel" of the Contractor in Part 4 of Schedule A, the Contractor must cause those individuals to perform the Services on the Contractor's behalf, unless the Province otherwise approves in writing, which approval must not be unreasonably withheld.

Pertinent information

13.13 The Province must make available to the Contractor all information in the Province's possession which the Province considers pertinent to the performance of the Services.

Conflict of interest

13.14 The Contractor must not provide any services to any person in circumstances which, in the Province's reasonable opinion, could give rise to a conflict of interest between the Contractor's duties to that person and the Contractor's duties to the Province under this Agreement.

Time

13.15 Time is of the essence in this Agreement and, without limitation, will remain of the essence after any modification or extension of this Agreement, whether or not expressly restated in the document effecting the modification or extension.

Conflicts among provisions

13.16 Conflicts among provisions of this Agreement will be resolved as follows:

(a) a provision in the body of this Agreement will prevail over any conflicting provision in, attached to or incorporated by reference into a schedule, unless that conflicting provision expressly states otherwise; and

(b) a provision in a schedule will prevail over any conflicting provision in a document attached to or incorporated by reference into a schedule, unless the schedule expressly states otherwise.

Agreement not permit nor fetter

13.17 This Agreement does not operate as a permit, license, approval or other statutory authority which the Contractor may be required to obtain from the Province or any of its agencies in order to provide the Services. Nothing in this Agreement is to be construed as interfering with, or fettering in any manner, the exercise by the Province or its agencies of any statutory, prerogative, executive or legislative power or duty.

Remainder not affected by invalidity

13.18 If any provision of this Agreement or the application of it to any person or circumstance is invalid or unenforceable to any extent, the remainder of this Agreement and the application of such provision to any other person or circumstance will not be affected or impaired and will be valid and enforceable to the extent permitted by law.

Further assurances

13.19 Each party must perform the acts, execute and deliver the writings, and give the assurances as may be reasonably necessary to give full effect to this Agreement.

Additional terms

13.20 Any additional terms set out in the attached Schedule F apply to this Agreement.

Governing law

13.21 This Agreement is governed by, and is to be interpreted and construed in accordance with, the laws applicable in British Columbia.

## 14 INTERPRETATION

14.1 In this Agreement:

(a) "includes" and "including" are not intended to be limiting;

(b) unless the context otherwise requires, references to sections by number are to sections of this Agreement;

(c) the Contractor and the Province are referred to as "the parties" and each of them as a "party";

(d) "attached" means attached to this Agreement when used in relation to a schedule;

(e) unless otherwise specified, a reference to a statute by name means the statute of British Columbia by that name, as amended or replaced from time to time;

(f) the headings have been inserted for convenience of reference only and are not intended to describe, enlarge or restrict the scope or meaning of this Agreement or any provision of it;

(g) "person" includes an individual, partnership, corporation or legal entity of any nature; and

(h) unless the context otherwise requires, words expressed in the singular include the plural and *vice versa*.

## 15 EXECUTION AND DELIVERY OF AGREEMENT

15.1 This Agreement may be entered into by a separate copy of this Agreement being executed by, or on behalf of, each party and that executed copy being delivered to the other party by a method provided for in section 13.1 or any other method agreed to by the parties.

The parties have executed this Agreement as follows:

| | |
|---|---|
| SIGNED on the 1 day of April, 2019 by the Contractor (or, if not an individual, on its behalf by its authorized signatory or signatories): | SIGNED on the 2nd day of April, 2019 on behalf of the Province by its duly authorized representative: |
| Signature(s) | Signature |
| Print Name(s): JANET PATTERSON | Print Name: TREVOR HUGHES. |
| Print Title(s) | Print Title: DEPUTY MINISTER. |

## Schedule A – Services

**PART 1. TERM:**

1. The term of this Agreement commences on **April 1, 2019** and ends on **October 31, 2019.**

**PART 2. SERVICES:**

In the course of this focused review of the workers' compensation system, to be conducted in accordance with terms of reference issued by the Minister of Labour on March 4, 2019, the Contractor **must** consider the following specific issues:

1. The policy and practices used in the workers' compensation system relating to supporting injured workers' return to work;
2. An evaluation of current WorkSafeBC policy and practices through a Gender-based Analysis Plus (GBA+) lens;
3. Modernizing WorkSafeBC's culture to reflect a worker-centric service delivery model. This model should incorporate a best practices, research-supported approach to managing physical and mental injuries caused by the workplace;
4. Recommendations dealing with issues related to the improved case management of injured workers;
5. What specific steps are required to increase confidence of workers and employers in the workers' compensation system, including but not limited to the Fair Practices Office, and in the other services provided by WorkSafeBC;
6. Whether there are any other urgent compensation issues that were not addressed in the December 2018 report of Terry Bogyo entitled "Balance. Stability. Improvement. Options for the Accident Fund".

The contractor may recommend targeted amendments to the *Workers Compensation Act* only if those amendments result from this focused review and the six specific issues listed above. This focused review of the workers' compensation system is **not** intended to be a full review of the Workers Compensation Act.

The contractor **must** engage in consultations with and receive submissions from interested employer and union/worker stakeholders including hearing directly from injured workers from all regions of the province. The consultations should be conducted in an open and transparent way. To the greatest extent practicable, members of the public, including injured workers, should be permitted to participate in public consultations. Members of the public participating in public consultations or otherwise submitting information to the review should do so publicly. In exceptional and limited circumstances, participants in the consultation process may do so confidentially. In those circumstances the reviewer should verify their identity and then assign the individual a unique numeric identifier for further attribution in the review process. The contractor will work with the Ministry to further design the stakeholder consultation process.

**Reporting requirements**

The Contractor **must** provide the following reports:

- **Progress report** – on or before July 2, 2019;
- **Draft report** – on or before September 1, 2019; and
- **Final report** – on or before September 30, 2019

**PART 3. RELATED DOCUMENTATION:**

1. The following are Appendices to this Schedule A:
    - **Appendix 1** – April 25, 2018 report entitled "Restoring the Balance: A Worker-Centered Approach to Workers' Compensation Policy" (Paul Petrie)
    - **Appendix 2** – December 13, 2018 report entitled "Balance. Stability. Improvement. Options for the Accident Fund" (Terry Bogyo)
    - **Appendix 3** – Link to the federal Department of Women and Gender Equality's course and resource materials on Gender Based Analysis Plus (GBA+)
    - **Appendix 4** – Terms of Reference for Workers' Compensation System Review, March 3, 2019

**PART 4. KEY PERSONNEL:**

(a) Janet K. Patterson

## Schedule B – Fees and Expenses

### 1. MAXIMUM AMOUNT PAYABLE:

**Maximum Amount:** Despite sections 2 and 3 of this Schedule, **$400,000** is the maximum amount which the Province is obliged to pay to the Contractor for fees and expenses under this Agreement (exclusive of any applicable taxes described in section 3 of this Agreement).

### 2. FEES ($370,000):

**Hourly Rates**

| Contractor Role | Rate |
|---|---|
| Project lead (Janet K. Patterson) | $2500 per diem for each full day where hours worked exceed 3.5 in one day; $1250 per diem for each half day where hours worked are up to 3.5 in one day. |

### 3. EXPENSES ($30,000):

**Expenses:**

**Pre-approved** travel, accommodation and meal expenses for travel greater than 32 kilometers away from **3701 Hastings Street in Burnaby, BC** on the same basis as the Province pays its Group II employees when they are on travel status; and excluding goods and services tax ("GST") or other applicable tax paid or payable by the Contractor on expenses described above to the extent that the Contractor is entitled to claim credits (including GST input tax credits), rebates, refunds or remissions of the tax from the relevant taxation authorities.

### 4. STATEMENTS OF ACCOUNT:

**Statements of Account:** In order to obtain payment of any fees and expenses under this Agreement for all hours worked during a period from and including the 1st day of a month to and including the last day of that month ("Billing Period"), the Contractor must deliver to the Province on a date after the Billing Period (each a "Billing Date"), a written statement of account in a form satisfactory to the Province containing:

(a) the Contractor's legal name and address;

(b) the date of the statement, and the Billing Period to which the statement pertains;

(c) the Contractor's calculation of all fees claimed for that Billing Period, including a declaration by the Contractor of all hours worked on each day during the Billing Period for which the Contractor claims fees and a description of the applicable fee rates;

(d) a chronological listing, in reasonable detail, of any expenses claimed by the Contractor for the Billing Period with receipts attached, if applicable, and, if the Contractor is claiming reimbursement of any GST or other applicable taxes paid or payable by the Contractor in relation to those expenses, a description of any credits, rebates, refunds or remissions the Contractor is entitled to from the relevant taxation authorities in relation to those taxes;

(e) the Contractor's calculation of any applicable taxes payable by the Province in relation to the Services for the Billing Period;

(f) a description of this Agreement;

(g) a statement number for identification; and

(h) any other billing information reasonably requested by the Province.

## 5. PAYMENTS DUE:

**Payments Due**: Within 30 days of the Province's receipt of the Contractor's written statement of account delivered in accordance with this Schedule, the Province must pay the Contractor the fees and expenses (plus all applicable taxes) claimed in the statement if they are in accordance with this Schedule. Statements of account or contract invoices offering an early payment discount may be paid by the Province as required to obtain the discount.

## Schedule C – Approved Subcontractor(s)

The following Subcontractor(s) have been approved to work on the Services described in Schedule A.

- researcher name – Jim Parker
- Support Staff – Sinead Dwyer
- Review Coordinator – Donna Hanson

## Schedule D – Insurance

1. The Contractor must, without limiting the Contractor's obligations or liabilities and at the Contractor's own expense, purchase and maintain throughout the Term the following insurances with insurers licensed in Canada in forms and amounts acceptable to the Province:

   (a) Commercial General Liability in an amount not less than **$2,000,000** inclusive per occurrence against bodily injury, personal injury and property damage and including liability assumed under this Agreement and this insurance must

      (i) include the Province as an additional insured,

      (ii) be endorsed to provide the Province with 30 days advance written notice of cancellation or material change, and

      (iii) include a cross liability clause.

2. All insurance described in section 1 of this Schedule must:

   (a) be primary; and

   (b) not require the sharing of any loss by any insurer of the Province.

3. The Contractor must provide the Province with evidence of all required insurance as follows:

   (a) within 10 Business Days of commencement of the Services, the Contractor must provide to the Province evidence of all required insurance in the form of a completed Province of British Columbia Certificate of Insurance;

   (b) if any required insurance policy expires before the end of the Term, the Contractor must provide to the Province within 10 Business Days of the policy's expiration, evidence of a new or renewal policy meeting the requirements of the expired insurance in the form of a completed Province of British Columbia Certificate of Insurance; and

   (c) despite paragraph (a) or (b) above, if requested by the Province at any time, the Contractor must provide to the Province certified copies of the required insurance policies.

4. The Contractor must obtain, maintain and pay for any additional insurance which the Contractor is required by law to carry, or which the Contractor considers necessary to cover risks not otherwise covered by insurance specified in this Schedule in the Contractor's sole discretion.

## Schedule E – Privacy Protection Schedule

### Definitions

1. In this Schedule,

   (a) "**access**" means disclosure by the provision of access;

   (b) "**Act**" means the *Freedom of Information and Protection of Privacy Act*;

   (c) "**contact information**" means information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual;

   (d) "**personal information**" means recorded information about an identifiable individual, other than contact information, collected or created by the Contractor as a result of the Agreement or any previous agreement between the Province and the Contractor dealing with the same subject matter as the Agreement but excluding any such information that, if this Schedule did not apply to it, would not be under the "control of a public body" within the meaning of the Act; and

   (e) "**privacy course**" means the Province's online privacy and information sharing training course.

### Purpose

2. The purpose of this Schedule is to:

   (a) enable the Province to comply with the Province's statutory obligations under the Act with respect to personal information; and

   (b) ensure that, as a service provider, the Contractor is aware of and complies with the Contractor's statutory obligations under the Act with respect to personal information.

### Collection of personal information

3. Unless the Agreement otherwise specifies or the Province otherwise directs in writing, the Contractor may only collect or create personal information that is necessary for the performance of the Contractor's obligations, or the exercise of the Contractor's rights, under the Agreement.

4. Unless the Agreement otherwise specifies or the Province otherwise directs in writing, the Contractor must collect personal information directly from the individual the information is about.

5. Unless the Agreement otherwise specifies or the Province otherwise directs in writing, the Contractor must tell an individual from whom the Contractor collects personal information:

   (a) the purpose for collecting it;

   (b) the legal authority for collecting it; and

   (c) the title, business address and business telephone number of the person designated by the Province to answer questions about the Contractor's collection of personal information.

### Privacy Training

6. The Contractor must ensure that each person who will provide services under the Agreement that involve the collection or creation of personal information will complete, at the Contractor's expense, the privacy course prior to that person providing those services.

7. The requirement in section 6 will only apply to persons who have not previously completed the privacy course.

**Accuracy of personal information**

8. The Contractor must make every reasonable effort to ensure the accuracy and completeness of any personal information to be used by the Contractor or the Province to make a decision that directly affects the individual the information is about.

**Requests for access to personal information**

9. If the Contractor receives a request for access to personal information from a person other than the Province, the Contractor must promptly advise the person to make the request to the Province unless the Agreement expressly requires the Contractor to provide such access and, if the Province has advised the Contractor of the name or title and contact information of an official of the Province to whom such requests are to be made, the Contractor must also promptly provide that official's name or title and contact information to the person making the request.

**Correction of personal information**

10. Within 5 Business Days of receiving a written direction from the Province to correct or annotate any personal information, the Contractor must annotate or correct the information in accordance with the direction.

11. When issuing a written direction under section 10, the Province must advise the Contractor of the date the correction request to which the direction relates was received by the Province in order that the Contractor may comply with section 12.

12. Within 5 Business Days of correcting or annotating any personal information under section 10, the Contractor must provide the corrected or annotated information to any party to whom, within one year prior to the date the correction request was made to the Province, the Contractor disclosed the information being corrected or annotated.

13. If the Contractor receives a request for correction of personal information from a person other than the Province, the Contractor must promptly advise the person to make the request to the Province and, if the Province has advised the Contractor of the name or title and contact information of an official of the Province to whom such requests are to be made, the Contractor must also promptly provide that official's name or title and contact information to the person making the request.

**Protection of personal information**

14. The Contractor must protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or disposal, including any expressly set out in the Agreement.

**Storage and access to personal information**

15. Unless the Province otherwise directs in writing, the Contractor must not store personal information outside Canada or permit access to personal information from outside Canada.

**Retention of personal information**

16. Unless the Agreement otherwise specifies, the Contractor must retain personal information until directed by the Province in writing to dispose of it or deliver it as specified in the direction.

**Use of personal information**

17. Unless the Province otherwise directs in writing, the Contractor may only use personal information if that use is for the performance of the Contractor's obligations, or the exercise of the Contractor's rights, under the Agreement.

**Disclosure of personal information**

18. Unless the Province otherwise directs in writing, the Contractor may only disclose personal information inside Canada to any person other than the Province if the disclosure is for the performance of the Contractor's obligations, or the exercise of the Contractor's rights, under the Agreement.

19. Unless the Agreement otherwise specifies or the Province otherwise directs in writing, the Contractor must not disclose personal information outside Canada.

**Notice of foreign demands for disclosure**

20. In addition to any obligation the Contractor may have to provide the notification contemplated by section 30.2 of the Act, if in relation to personal information in the custody or under the control of the Contractor, the Contractor:

    (a) receives a foreign demand for disclosure;

    (b) receives a request to disclose, produce or provide access that the Contractor knows or has reason to suspect is for the purpose of responding to a foreign demand for disclosure; or

    (c) has reason to suspect that an unauthorized disclosure of personal information has occurred in response to a foreign demand for disclosure

    the Contractor must immediately notify the Province and, in so doing, provide the information described in section 30.2(3) of the Act. In this section, the phrases "foreign demand for disclosure" and "unauthorized disclosure of personal information" will bear the same meanings as in section 30.2 of the Act.

**Notice of unauthorized disclosure**

21. In addition to any obligation the Contractor may have to provide the notification contemplated by section 30.5 of the Act, if the Contractor knows that there has been an unauthorized disclosure of personal information in the custody or under the control of the Contractor, the Contractor must immediately notify the Province. In this section, the phrase "unauthorized disclosure of personal information" will bear the same meaning as in section 30.5 of the Act.

**Inspection of personal information**

22. In addition to any other rights of inspection the Province may have under the Agreement or under statute, the Province may, at any reasonable time and on reasonable notice to the Contractor, enter on the Contractor's premises to inspect any personal information in the possession of the Contractor or any of the Contractor's information management policies or practices relevant to the Contractor's management of personal information or the Contractor's compliance with this Schedule and the Contractor must permit, and provide reasonable assistance to, any such inspection.

**Compliance with the Act and directions**

23. The Contractor must in relation to personal information comply with:

    (a) the requirements of the Act applicable to the Contractor as a service provider, including any applicable order of the commissioner under the Act; and

    (b) any direction given by the Province under this Schedule.

24. The Contractor acknowledges that it is familiar with the requirements of the Act governing personal information that are applicable to it as a service provider.

**Notice of non-compliance**

25. If for any reason the Contractor does not comply, or anticipates that it will be unable to comply, with a provision in this Schedule in any respect, the Contractor must promptly notify the Province of the particulars of the non-compliance or anticipated non-compliance and what steps it proposes to take to address, or prevent recurrence of, the non-compliance or anticipated non-compliance.

**Termination of Agreement**

26. In addition to any other rights of termination which the Province may have under the Agreement or otherwise at law, the Province may, subject to any provisions in the Agreement establishing mandatory cure periods for defaults by the Contractor, terminate the Agreement by giving written notice of such termination to the Contractor, upon any failure of the Contractor to comply with this Schedule in a material respect.

**Interpretation**

27. In this Schedule, references to sections by number are to sections of this Schedule unless otherwise specified in this Schedule.

28. Any reference to the "Contractor" in this Schedule includes any subcontractor or agent retained by the Contractor to perform obligations under the Agreement and the Contractor must ensure that any such subcontractors and agents comply with this Schedule.

29. The obligations of the Contractor in this Schedule will survive the termination of the Agreement.

30. If a provision of the Agreement (including any direction given by the Province under this Schedule) conflicts with a requirement of the Act or an applicable order of the commissioner under the Act, the conflicting provision of the Agreement (or direction) will be inoperative to the extent of the conflict.

31. The Contractor must comply with the provisions of this Schedule despite any conflicting provision of this Agreement or, subject to section 32, the law of any jurisdiction outside Canada.

32. Nothing in this Schedule requires the Contractor to contravene the law of any jurisdiction outside Canada unless such contravention is required to comply with the Act.

## Schedule F – Additional Terms

Not applicable

## Schedule G – Security Schedule

Not applicable

## Schedule G – Appendix G1 – Additional Security Obligations

Not applicable

# RESTORING THE BALANCE

## A WORKER-CENTRED APPROACH
### to Workers' Compensation Policy

**A Report to the Board of Directors**
**Workers' Compensation Board of BC**

**March 31, 2018**

**Paul Petrie**

## TRANSITION TOWARDS A WORKER-CENTRED APPROACH

*Introduction*

This report has been prepared for the chair of the Board of Directors of the Workers' Compensation Board[1] (Board). The terms of reference for this review asked that I review the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II) and any other matters the chair may request including:

- assess in relation to other Canadian jurisdictions whether the current Board benefit levels fully reflect the financial losses suffered by injured workers;

- consult with external stakeholders including members of the Policy and Practice Consultative Committee (PPCC), representatives of the Workers' Advisers Office and Employers' Advisers Office, representatives of the Board's administration, and other parties that the chair may indicate; and

- recommend possible changes to the RSCM II policies to ensure a worker-centred approach wherever practicable.

The contract commenced on January 8, 2018 with the final report to the chair due on or before March 31, 2018. Given the limited timeline for the report, this is not a comprehensive review of claims policy. In order to identify the issues of greatest concern to representatives of the worker and employer communities I consulted widely with these stakeholders as part of this review. Between January 26 and March 8, 2018, I held 69 consultation meetings with members of the Board of Directors (9); Board staff (9); employer representatives (12); worker representatives (19); Ministry of Labour (4); other (5).

I also had an opportunity to meet with the 40+ employer representatives who attended my presentation to the Employers Forum on February 23 and the 9 members of the BC Federation of Labour compensation committee who attended my February 5 session. In almost all cases I met at the workplace of the person consulted. Appendix A contains a list of individuals I consulted in this review. It was on the basis of these consultations

[1] now operating as WorkSafeBC. The Act refers to the Workers Compensation Board as the legal entity under the Act and I refer to the WCB or "the Board" to identify the overall workers' compensation system covered by the Act. "The Board" is also the common term used in the *Rehabilitation Services and Claims Manual* to refer to the Workers' Compensation Board and the WorkSafeBC administration.

that I identified the issues addressed in this review and developed the policy proposals for the consideration of the Board of Directors.

I wish to recognize the willingness of representatives of both the worker and employer communities to share their carefully considered views and proposed solutions. I also acknowledge the full cooperation of the Board's administration in providing information, analysis, insights and cautions to ensure that my efforts have the benefit of their experience and knowledge. While I fully appreciate the many contributions I have received in the course of this time-limited review, any oversights, errors or omissions are wholly my responsibility.

The focus of this review is on identifying policy options within the bounds of the current legislation for consideration by the Board of Directors to ensure a worker-centred approach that maximizes recovery from the workplace injury or disease and restores injured workers to safe, productive and durable employment.

I have organized the issues addressed in this review into the following general topic areas:



## *The Historical Context*

My terms of reference direct me to assess whether the current Board benefit levels fully reflect the financial losses suffered by injured workers. To some degree Board benefit levels are determined by the provisions in the legislation and legislative considerations are not before me in this policy review. It is important to consider the degree to which the current adjudication of claims restores the financial losses suffered by injured workers in the historical context to provide some perspective on this issue.

The Historic Compromise which is the foundation of the workers' compensation system is based on a balance between worker and employer interests. Workers gave up their rights to sue negligent employers in exchange for no fault compensation funded collectively by employers and administered independent of government outside the court system. Maintaining the balance in the workers' compensation system that retains the confidence of both the employer and worker community is essential to the system's long-term survival. Where system changes upset the balance of interests between workers and employers, steps must be taken to restore that balance.

Maintaining the balance in the workers' compensation system has historically relied on periodic royal commissions to provide an independent review and to make recommendations to government to ensure the viability of the system. The last royal commission was carried out by Mr. Justice Gill who delivered the Royal Commission Report[2] on Workers' Compensation in British Columbia - *For the Common Good* - in January 1999. In that report he concluded that:

> The commission determined that, while deserving praise for fiscal responsibility, the Workers' Compensation Board of British Columbia has failed in its mandate to administer fair and equitable benefits to all injured workers, often those most in need of assistance. (page xix)

He also identified: "...severe shortcomings in leadership, lack of defined goals, poor performance evaluation and deficient accountability structures and processes." (page xx)

Following the Royal Commission Report, the newly elected Liberal Government commissioned a Core Services Review[3] of the workers' compensation system to review the law and policy which was carried out by Alan Winter. In addition, the government commissioned a second "Service Delivery Review" carried out by Allan Hunt from the US based Upjohn Institute[4]

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[2] FOR THE COMMON GOOD Final Report of the Royal Commission on Workers' Compensation in British Columbia, Judge Gurmail S. Gill Commission Chairman, Oksana Exell Commissioner, Gerry Stoney Commissioner

[3] Core Services Review of the Workers' Compensation Board, 2002

[4] "Why Not the Best", Service Delivery Review by H. Allan Hunt PhD of the US Based Upjohn Institute

The Winter Core Services Review provided the basis for Bill 49 introduced by the Liberal Government in 2002 to bring major changes to the British Columbia Workers' Compensation System. These changes were in response to strong advocacy from the employer community based on the contention that the Workers' Compensation Board had become economically unsustainable. The British Columbia economy had been through a down turn in the 2000-2001 recession, impacting the Board's investment portfolio that resulted in a projected unfunded liability.

The former government introduced Bill 49 to address the concerns advanced by employers. During the May 16, 2002 second reading of Bill 49 the Minister of Skills Development and Labour raised concerns about the financial impact on the Board of the continuation of the benefits levels then in place and outlined the following goals of Bill 49:

> The goals of this bill are to restore the system to financial sustainability by bringing costs under control, to make the system more responsive and to maintain benefits for injured workers, which are among the highest and best in Canada, while ensuring fairness for workers and employers. (Hansard, Volume 8, No. 3 at page 3547)

The primary purpose of the amendments to the Act that became effective on June 30, 2002 was to reduce the costs of workers' compensation benefits to address what the government had concluded was required to achieve a more financially sustainable system in the future. Interestingly the Board had an operating surplus of $571 million in 2002.

The changes enacted by Bill 49 and subsequent initiatives included:

- A dramatic reduction in loss of earnings pensions by limiting access to only exceptional cases.

- A major reduction in resources devoted to vocational rehabilitation assistance to help workers return to work.

- A new limitation in lifetime permanent impairment pensions to age 65 unless the Board was satisfied that the worker would have retired at a later date.

- A reduction in compensation benefits from 75% of gross earnings to 90% of net earnings resulting in a general reduction in wage loss benefits.

- The reduction in the Consumer Price index to the CPI rate less 1% with a cap at 4%.

- Increased restrictions on the manner of determining a worker's wage rate.

- A 75-day limit on the ability to review and re-adjudicate prior decisions even if subsequent evidence challenged the validity of that decision.

- The imposition of binding policy to limit decision makers' ability to exercise discretion on the basis of the merits and justice of the case.

- Elimination of the Board's Appeal Division that applied remedial jurisdiction to resolving appeals and the creation of the external Workers Compensation Appeal Tribunal that was bound by Board policy.

- Introduction of a computer-assisted case management system that focused more on the application of policy to claims adjudication and less on the merits and justice of the individual worker's case.

In 2010 the Board again retained H. Allan Hunt to assess the Board's progress on the recommendations he made in his 2002 review in light of the legislative changes introduced in 2002. His May 2010 report[5] summarized evaluation of a range of service delivery measures including benefit adequacy, return to work outcomes and timeliness of claim processing. He noted significant problems with the launch of the computerized claims management system which he attributed to implementation challenges that would likely be resolved with time. Hunt also reviewed the Board's progress with his prior service delivery recommendations and concluded:

> WorkSafeBC has successfully transformed itself into a customer-oriented service organisation in the past decade. In my opinion, this is due primarily to the consistency of the leadership at WorkSafeBC and the unwavering focus of that leadership on the goal of service quality. The transformation may not be 100 percent complete yet, but the contrast with the organisation that I first encountered in 1991 is very striking indeed.

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[5] Service Delivery Core Review: A Reappraisal, May 2010, H. Allan Hunt, PhD W.E. Upjohn Institute, Michigan, USA

Hunt qualified his findings somewhat by noting that the context in which his 2010 review was carried out covered the period 2002 to 2008 when the British Columbia economy was in a strong growth phase with unemployment dropping from 8.5% in 2002 to 4.6% in 2008. During that period the Board's operating surplus averaged approximately $500 million. However, the world-wide recession that occurred in 2008 saw the unemployment rate rise from 4.6% to 7.6% in 2009. He indicated his review concentrated mainly on the 2002-2008 period.

The Board also commissioned a series of studies with the Canadian Institute for Work and Health to review the impact of Bill 49 on benefit adequacy and equity.[6] The study reported on post-accident earnings and benefits adequacy and equity of long- and short-term disability claims. The methodology compared the benefits injured workers received under the pre-Bill 49 policy with the benefits they would have received under the Bill 49 changes. The study looked at the impact of three changes introduced under Bill 49: the change to 90% of net earnings, the reduction in the application of CPI, and the limitation of loss of earnings pensions to only those cases considered "exceptional". On the basis of these three factors, the authors concluded that for long term pension benefits:

> Overall, the move to Bill 49 resulted in reduced benefits. For the entire sample the reduction was 15%.

The greatest impact was to injured workers in the 50-59 age bracket with the earnings replacement rate at 82% well below the target rate of 90% of their pre-injury earnings. The authors indicated this age bracket was the most vulnerable to the changes introduced in Bill 49. The authors did not factor in the impacts of the inclusion of Canada Pension Plan benefits, and the limitation of loss of function pensions to age 65. They pointed out that these impacts, especially for older injured workers, would show even greater loss of benefits.

The authors recommended a more worker-centred approach with greater consideration of individual experiences of these workers and contextual factors that affect them, since injured workers with similar impairment levels may have dramatically different earnings recovery patterns.

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[6] "WorkSafeBC Study Report I: The Impact of Bill 49 on Benefits Adequacy and Equity," July 2011; Emile Tompa et. al., Institute For Work and Health.

The Board conducts quarterly surveys of both employers and workers to gage the level of their "overall experience" with the Board. Approximately 80% of surveyed workers rate their overall experience with the Board as good or very good. This has improved from 74% in 2011. Approximately 83% of employers rate their satisfaction as either good or very good.

These indicators suggest that the Board is meeting the expectations of a large majority of workers and employers. A majority of the claims are being handled well. However, there is still a significant percentage of both employers and workers for whom the Board is not meeting their expectations. The Board's senior staff acknowledge that there is still a significant number of workers and employers where the Board could be doing a better job at providing the necessary supports to maximize recovery and restore the injured worker to safe, productive and durable employment.

*Comparison of benefits with other jurisdictions*

The terms of reference directed me to assess whether the current Board benefit levels fully reflect the financial losses suffered by injured workers in relation to other Canadian jurisdictions. Inter-jurisdictional comparisons are challenging, since each province has its own legislation and policy for interpreting and applying that legislation. The Association of Workers' Compensation Boards of Canada (AWCBC) provides the most carefully developed inter-jurisdictional comparisons with explanatory notes where comparisons require qualification.

Appendix B contains some of the key comparisons based on data collected and analyzed by the AWCBC. Calculation methodology for these measures are detailed on the AWCBC website. It is beyond the scope of this time-limited review to go beyond the readily available information on comparative benefit levels.

Table 1.1 provides inter-jurisdictional comparisons of the incidence of time loss claims, injury frequency rates, average claims duration, and permanent impairment ratings. The following summarizes the information in that table.

*Time loss frequency rates:*

- British Columbia has the 2nd highest injury frequency rate at 2.20 claims per 100 person years of employment.

*Average duration of claims:*

- British Columbia has the 4th highest composite duration of time loss claims of the nine jurisdictions reporting at 70.9 days.

*Average permanent impairment rating:*

- British Columbia ranks 8th (9.6%) out of the 11 jurisdictions reporting on the average impairment rating for permanent disabilities with Ontario and Quebec showing a higher average rating.

Table 1.2 includes a comparison of:

*Maximum insurable earnings for 2016:*

- BC has the 4th highest insurable earnings at $78,600. Manitoba has no maximum and Alberta and Northwest territories ranks second and third.

*Basis for calculating earnings benefits:*

- All provinces and territories now base earnings benefits on a percentage of net earnings. Of the eleven jurisdictions reporting, six including British Columbia base earnings benefits on 90% of net earnings. Five base earnings benefits on 85% of net or lower.

*Permanent disability benefit limits:*

- British Columbia has the third highest maximum amount ($4,486) for total permanent disability benefits for the seven jurisdictions reporting. Four provinces have no minimum for permanent disability. British Columbia has the lowest minimum ($1,428.70) of the four provinces that have established a minimum for permanent total disability.

*Vocational Rehabilitation/Duty to Accommodate:*

- Table 2 (page 77) provides an inter-jurisdiction comparison of return to work - duty to accommodate provisions contained in the statutes of different jurisdictions. British Columbia is the only major province that does not have a statutory duty to accommodate injured workers. Northwest Territories and Nunavut also do not have a statutory duty to accommodate in their legislation. This has implications for some of the key recommendations in this review.

An overall assessment based on this data shows that the British Columbia Workers' Compensation Board is generally in the middle of the pack when comparing benefit lev-

els and structures with other jurisdictions. The current benefit levels are rooted in the statutory changes enacted in 2002 by the previous government.

The changes enacted in 2002 focused primarily on reducing the costs resulting from injury and illness and has succeeded in achieving this fiscal objective. The successes have been achieved largely through a policy-driven case management system. While this approach has apparently worked for the average claim where there are no complications, it has not always worked well for more complex claims that do not fit the expected profile for the particular diagnosis being adjudicated. In those cases, the worker's recover is expected to fit into the established profile and when it does not, the supports needed for the worker's recovery are often not provided and that worker is left behind by the system.

It is apparent from the research provided by the Institute for Work and Health that the changes introduced in 2002 have impacted some groups of workers more than others. These vulnerable workers have experienced a disproportionate burden of the impacts of the cost-savings initiatives. This is not an unexpected result of a policy driven case management system that is designed to provide average justice based more on adjudicating the diagnosis and less on considering the relevant circumstances of the individual worker.

The available evidence indicates the current case management system does not fully compensate some injured workers for the losses resulting from the injury or disease. This is particularly the case for older workers with permanent disabilities that significantly impair their earning capacity. I address this issue in the next section of this report.

## A WORKER-CENTRED APPROACH TO DECISION MAKING

The second provision in my terms of reference is to recommend possible changes to the *Rehabilitation and Claims Services Manual* (RCSM II) policies to ensure a worker-centred approach to policy issues wherever practicable. A worker-centred approach for injured and disabled workers is one that takes into consideration the worker's individual circumstances in applying policy and making decisions about benefit entitlement and rehabilitation measures. It is designed to maximize the worker's recovery from the injury or disease and to restore as close as possible the worker to his pre-injury employment status without a loss of earnings.

### *The Merits and Justice of the Case*

Section 99 of the Act provides the foundation for all decisions made under the Act. That section states:

> **99** (1) The Board may consider all questions of fact and law arising in a case, but the Board is not bound by legal precedent.
>
> (2) The Board must make its decision based upon the merits and justice of the case, but in so doing the Board must apply a policy of the board of directors that is applicable in that case. [7]
>
> (3) If the Board is making a decision respecting the compensation or rehabilitation of a worker and the evidence supporting different findings on an issue is evenly weighted in that case, the Board must resolve that issue in a manner that favours the worker.

Subsection 99(2) is the pivotal provision for considering a worker-centred approach. Bill 49 amended section 99 in 2002 by adding the phrase: "but in so doing the Board must apply a policy of the board of directors that is applicable in that case." The purpose of that addition was to bring a greater degree of consistency to decision- making. Following the statutory change the Board brought in a new policy manual to address the

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[7] the citation of section 99(2) in policy #2.20 has a minor typographical error. Section 99(2) in the Workers Compensation Act states that: "The Board must make **its** decision based upon the merits and justice of the case...". The policy misquotes section 99(2) to read, "The Board must make **a** decision based on the merits and justice of the case..."

changes in the legislation and to place a greater emphasis on the application of policy and the direction to Board officers to carry out that policy.

For example, with respect to referrals of a claim for permanent disability consideration, the pre-2002 policy #96.20 provided discretion to the decision-maker to refer a claim for assessment of a "potential permanent disability" to the Disability Awards Department for an assessment based on the evidence of the worker and/or the evidence of the treating physician. The disability awards officer would arrange for a medical examination and then decide whether there was a permanent disability based on the permanent functional impairment assessment.

In the current version of the RSCM II, policy #96.20 has been completely removed from the manual. The replacement policy #96.30 now simply reads:

> The Board determines whether an actual or potential permanent disability is accepted on a claim.

This may result in a greater degree of consistency in referrals to disability awards, but it does not specifically require the Board to take into consideration the evidence of the worker who experiences the impact of the disability and the evidence of the treating physician who has direct clinical evidence of the nature and extent of the worker's impairment resulting from the injury.

Policy #2.20 in the RSCM II indicates that:

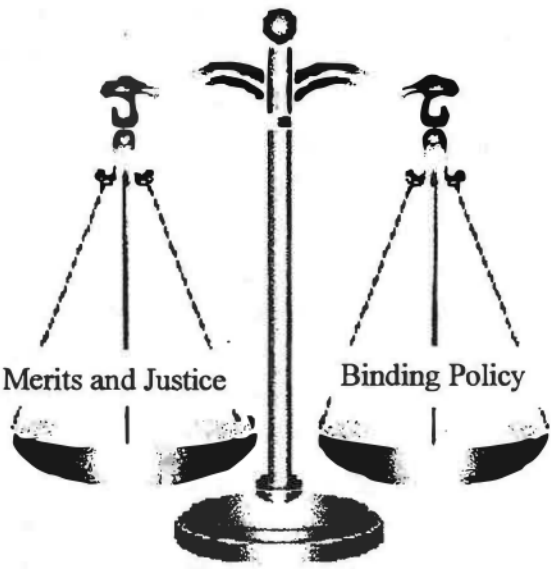
> Each policy creates a framework that assists and **directs** the Board in its decision-making role when certain facts and circumstances come before them. If such facts and circumstances arise and there is an applicable policy, **the policy must be followed**. (Emphasis added).

While the policy still provides for the Board to take into account the relevant facts and circumstances, the change to section 99(2) has made policy binding and has placed a greater emphasis on the application of the policy and relatively less emphasis on consideration of the facts and circumstances. This approach is reinforced in policy #2.20 as follows:

All substantive and associated practice components in the policies in this Manual are applicable under section 99(2) of the *Act* and must be followed in decision-making.

Prior to 2002 Board policy provided "adjudicative guidance" and so the individual circumstances - the merits and justice of the case - could provide a basis for exercising a greater degree of discretion. The introduction of binding policy has reduced the ability of decision-makers to apply the merits and justice of the case to the decision-making process. Binding policy also facilitates the use of a computerized case management system to guide claim investigation and decision-making, sometimes without sufficient consideration of all the circumstances from the worker's perspective.

*Restoring The Balance*




There is no specific reference in policy #2.20 to the requirement in section 99 that, "The Board must make its decision based on the merits and justice of the case." This provision in the legislation is at the heart of a worker-centred approach to the application of policy in a fair and compassionate way that is responsive to the worker's circumstances. Therefore, to provide a greater focus on a worker-centred approach:

1. **I recommend that the Board of Directors consider amending policy #2.20 to explicitly incorporate the requirement in section 99(2) that,**

**"the Board must make its decision based on the merits and justice of the case." That amendment can provide for the adequacy of the investigation of the relevant facts and circumstances of the issue to be decided and take into consideration the evidence of the worker in all cases.**

The focus on managing the claim primarily by reference to policy requirements rather than identifying the broader objective of determining what is needed to restore the individual worker to safe, productive and durable employment has left too many workers without a suitable job to return to and without adequate financial compensation to cover the loss where that employment is not reasonably available.

Providing the necessary supports to promote maximum recovery and achieve safe, productive and durable employment requires a more worker-centred approach to managing the claim especially for the more complex cases that don't fit neatly in the case management system. The inability of the case management system to fully identify and address the individual barriers that are impacting the injured worker's ability to return to a job that restores his or her pre-injury earnings often results in a disputed claim and a resort to the more adversarial appeals system. The delay in resolving the matter in dispute often means that finding a timely, workable solution is lost.

A case management system is an important component of an efficient workers' compensation system to ensure a level of consistency to decision-making. However, where that system does not have sufficient flexibility to consider the merits and justice of the individual worker's case, it erodes the principle of fairness and equity that is integral to the worker community's confidence in the system. When the workers' compensation system fails to provide fair and equitable compensation benefits, especially to the most seriously injured and vulnerable workers, corrective action is required. Incorporating a more worker-centred approach within the case management system is the most effective approach to address these inequities.

## MEDICAL EVIDENCE AND EVALUATION OF DISABILITY

The foundation of entitlement to workers' compensation benefits is medically confirmed disability arising out of and in the course of employment or due to the nature of the worker's employment. Section 5(2) of the Act provides for compensation where the worker is disabled from the work at which he or she is employed. This determination is made initially by the worker's treating physician or qualified medical practitioner on the Board's Form 8 and Form 11. For most cases with a straight-forward diagnosis, this is sufficient to process a short-term wage-loss claim.

Some employers express concern that the medical evidence provided by treating physicians is insufficient to document the limitations and restrictions resulting from a compensable injury and that the physician often serves as an advocate for the patient, simply repeating the worker's position. They also contend that it is difficult for a physician to provide a thorough evaluation in the short time allotted to medical treatment under the Medical Services Plan.

Worker representatives contend that the worker's physician is in the best position to identify the nature and extent of the disability based on their clinical evaluation. They express concern that the Board medical advisors often substitute their opinion over that of the treating physician without the benefit of an in-person examination or direct clinical evaluation.

The Board recognizes that it is important to secure quality medical evidence to ensure a fair and objective adjudication. The Board's chief medical officer has recently developed an accredited one-hour in-service training session for treating physicians with a focus on principles of disability management and safe return to work. The Board is also currently reviewing and revising the Form 8 and Form 11 to improve the utility of the medical information provided by treating physicians. There is recognition, however, that for the more serious injuries and complex diagnoses more information than can be provided on the basic forms would enhance the reliability and fairness of the decision-making process.

Ontario has addressed the issue of the availability and adequacy of trained community-based medical practitioners with expertise in occupational medicine by establishing a number of Occupational Health Clinics for Ontario Workers (OHCOW) in Hamilton, Toronto, Windsor, Sudbury, Sarnia, Thunder Bay and Ottawa. For over 25 years these clinics have provided medical diagnostic services for workers who may have work-relat-

ed health problems and are funded through the Ontario Ministry of Labour. The clinics are staffed by an inter-disciplinary team of nurses, hygienists, ergonomists, researchers, client service coordinators and contracted physicians.

These clinics provide a community-based, worker-centred approach to medical evaluation that is lacking in British Columbia. The mission of the OHCOW clinics is "to protect workers and their communities from occupational disease, injuries and illnesses; to support their capacity to address occupational hazards; and to promote the social, mental and physical well-being of workers and their families." In my view, British Columbia has much to learn from this model and the Board of Directors may wish to consider implementation of a similar model in BC.

The Ontario Workplace Safety and Insurance Board (WSIB) has introduced a functional abilities form (FAF) paid for by the WSIB that provides a more detailed evaluation of the worker's abilities and limitations. The clinical evaluation derived from this form provides a more reliable basis for determining the nature and extent of the impairment and resulting disability. It also provides a more substantial basis for determining what alternate duties the worker can perform when the injury prevents a return to the pre-injury job.

I propose a somewhat similar "Abilities and Limitations Form" be adopted by the Board. Such a form would not be necessary in the large majority of cases with a straight forward diagnosis with little or no time loss. However, for complex injuries and challenging diagnoses, the completion of this form would provide the most cost-effective clinical medical evidence at the outset of the claim to guide treatment and provide an informed basis for determining appropriate return to work options. The case manager would be in the best position to determine when this enhanced clinical evaluation is required. The payment for this more thorough clinical evaluation could be made under BCMA fee code 19907 or other code item the Board considers appropriate.

A copy of the form could be provided to the worker by the physician at the time of the clinical evaluation. The Board could provide the employer with necessary information from the form to guide placement in suitable alternate duties where the worker is unable to return to the pre-injury employment.

In order to provide a more complete clinical evaluation in appropriate cases and to guide return to suitable employment:

2. **I recommend that the Board of Directors support development of an "Abilities and Limitations Form" for completion by the treating physician at the request of the Board on a timely basis in appropriate cases to be paid out of the accident fund.**

*Timely resolution of medical disputes*

Prior to 2002 Medical Review Panels (MRP) under section 63 of the Act provided a process for resolution of medical disputes in complex and difficult cases at any adjudicative level within the decision-making process. The access to a MRP required a physician to certify a bona fide medical dispute and resulted in an appointment of a 3-person panel of physicians from a list of independent specialists: one chosen by the worker, one chosen by the employer, and a chair appointed by the Board. The MRP would examine the worker and provide a certificate of findings to resolve the dispute. The process was administratively complex, and it routinely took over a year to get a certificate of findings from the MRP. The medical findings were binding on the Board.

As a result of legislative changes in 2002 section 63 of the Act was repealed and no general provision was made for resolving medical disputes. The legislature did provide a mechanism under section 249 of the Act authorizing the Workers' Compensation Appeal Tribunal (WCAT) to provide assistance from an independent health professional (IHP) from a list established by the chair of WCAT. A WCAT panel may request a report from an IHP with terms of reference and questions to address the medical issue under consideration in the appeal. The panel will consider the IHP report when making its decision after providing the parties to the appeal an opportunity to make submissions on the report.

While the IHP process works well for WCAT in addressing medical issues in question, it does not offer a mechanism for resolving medical issues in dispute at other levels of decision-making. It is generally left to the parties when a medical dispute arises to secure a medical-legal opinion from a physician of their choice. When the worker or employer is able to obtain such an opinion, it is most often considered at the WCAT level long after the medical issue in dispute arose. This forces the parties in an adversarial process and delays timely adjudication of the issues in question.

The adversarial process is generally a non-therapeutic method of resolving medical issues in dispute often to the detriment of the worker and the recovery process. Securing

a medical legal opinion is also expensive and often difficult for an unrepresented worker to obtain.

Under the current case management approach, standardized return to work guidelines are used to support the management of claims and Board medical opinions often rely to some degree on these guidelines in formulating medical opinions.[8] Prior to the reliance on the case management system, Board medical advisors would more regularly conduct in-person examinations to provide a clinical evaluation as the basis for their opinions.

A medical dispute most often arises when the opinion of a Board medical advisor or consultant differs from the opinion of a treating physician or specialist. This dispute is compounded from the perspective of the worker and his or her treating physician where the medical advisor's opinion is made without the benefit of an in-person clinical exam. In my view the merits and justice of the case are best determined where there is reliable clinical evidence to support the opinion.

Where a clear medical dispute exists and a worker's physician provides sufficient reasons to clearly identify the basis for that dispute, an independent medical examination (IME) can provide a mechanism to resolve that dispute without the delays and adversarial stances that attend the review and appeal process. An early resolution of these disputes wherever possible can build confidence in the decision-making process and minimize the non-therapeutic consequences of the adversarial process. Like the IHP reports, the IME would not be binding on the decision-maker, but would provide persuasive clinical evidence to consider in resolving the issue in dispute.

This approach has some challenges. It would need to be administered in a way that is seen to be reasonably independent of the claims decision-making process. It would also need to be time-sensitive to provide an IME within 45-60 days of a decision in dispute to enable the case manager to consider whether it provided a basis for reconsideration of that decision.

The issue of where to locate the administration of the IME is a challenging one. This matter bears further review with involvement of the Board's Policy, Regulation and Research Division and the Board's chief medical officer. The organization in the workers' compensation system with the most experience and expertise on independent medical evaluation is the Workers' Compensation Appeal Tribunal (WCAT) on the basis of its di-

[8] The Board uses The ODG return to work guidelines to guide adjudicative practices.

rect involvement in the IHP process under section 249 of the Act and should be consulted on this issue. The resolution of the location of this process requires further consultation to explore the available options and to identify the most suitable and available one.

A roster of physicians prepared to conduct IMEs on an expedited basis could be compiled with assistance from the University of British Columbia (UBC) medical experts familiar with occupational medicine in consultation with the Board's chief medical officer. The goal of an IME process is to provide a mechanism to resolve established medical disputes, avoid unnecessary appeals and restore a greater degree of confidence in a fair decision-making process.

To achieve this goal:

3. **I recommend that the Board of Directors consider establishing an independent medical examination (IME) process to assist in resolving established medical disputes.**

*Preliminary determinations and expedited medical treatment*

The Board currently has policy #96.21 which provides income support where there is a significant delay in determining the eligibility of a claim where the delay is not the fault of the worker. That policy specifies that "health care benefit bills will not be paid under a preliminary determination."

In my view, there should be some discretion in this policy to provide expedited medical treatment where the claim qualifies for a preliminary determination and the medical evidence indicates that the worker is at risk for a significant deterioration without timely and appropriate medical attention.[9] This flexibility in policy could be particularly important for workers with a claim for a mental disorder under section 5.1 of the Act where the medical evidence indicates timely treatment intervention is needed to avoid a significant deterioration of the condition and to reduce the risk of prolonged disability without that intervention.

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[9] Available research indicates that early intervention should be based on medical evidence in the individual case. For example see: National Institute for Clinical Excellence. Post-traumatic Stress Disorder (PTSD): The Management of PTSD in Adults and Children in Primary and Secondary Care.2005. (NICE Clinical Guidelines, No. 26.) 7, Early interventions for PTSD in adults.); Kearns, M. C., Ressler, K. J., Zatzick, D. and Rothbaum, B. O. (2012), EARLY INTERVENTIONS FOR PTSD: A REVIEW. Depress Anxiety, 29: 833–842. doi:10.1002/da.21997; also see: https://jamanetwork.com/journals/jamapsychiatry/fullarticle/1107447

Where the conditions for a preliminary determination are met:

4. **I recommend that the Board of Directors consider a method for approval of medical treatment on an expedited basis where clinical medical evidence indicates the worker is at risk of a significant deterioration without that treatment.**

## VOCATIONAL REHABILITATION AND RETURN TO WORK SUPPORT

Early return to safe, productive and durable work is recognized as a key principle of the workers' compensation system. In his 1966 Royal Commission Report Mr. Justice Tysoe stated:

> 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 their rehabilitation and return to useful employment as soon as possible.[10]

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 is the primary focus of this review.

British Columbia is the only province in Canada where there is no legislative requirement in its Act for employers to rehire injured workers (See Table 2 page 77 in Appendix B for details).[11] The question I must consider in this review is whether there are policy options available that will ensure a worker-centred approach to return to work. I believe there are.

Section 16 of the Act provides:

> To aid in getting injured workers back to work or to assist in lessening or removing a resulting handicap, the Board may take the measures and make the expenditures from the accident fund that it considers necessary or expedient, regardless of the date on which the worker first became entitled to compensation.

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[10] Commission of Inquiry Workmen's Compensation Act, 1966; pp 18-19

[11] The Northwest Territories and Nunavut also do not have a statutory obligation to re-employ/ rehire injured workers.

This legislation gives the Board wide latitude to enact policy to restore injured workers to suitable employment that is safe, productive and durable to minimize any financial losses that the worker will incur as a result of the compensable disablement.
The *British Columbia Interpretation Act also* directs that "every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". My recommendations are guided by this approach.

*Duty to Accommodate*

While the Act is silent on a duty to accommodate, employers have the duty to accommodate to the extent of undue hardship under the BC Human Rights Code.[12] And during the Board's vocational rehabilitation process employers, workers and unions are expected to comply with Human Rights legislation and associated policies.

There has been a new development in the law on this matter. In a February 1, 2018 unanimous decision of the Supreme Court of Canada (*Quebec v. Caron)*[13], seven judges of the court relied on the duty to accommodate in Human Rights legislation in Quebec and ruled that "...Quebec employers have a duty under the province's injured workers' legislation to reasonably accommodate those injured in the workplace — even though that duty is not expressly mandated by the statute."[14] (emphasis added)

Whether that decision will have a direct impact on the BC Board's obligation to support a "duty to accommodate" under Human Rights legislation is a matter for the courts to decide. However, the reasons in the SCC judgement offer compelling guidance to speak to this issue in Board policy. The Board has a clear commitment under section 16 of the Act to support measures to restore injured workers to safe, productive and durable employment with whatever measures and expenditures from the accident fund it considers necessary and expedient.

The first lesson from *Caron* is to reinforce the principle and goal of restoring the injured worker to long-term employment with the injury employer at no loss of earnings or em-

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[12] Human Rights Code [RSBC 1996] Chapter 210

[13] Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron; 2018 SCC 3 -Case number 36605

[14] Supreme Court 'integrates' duty to accommodate into Quebec's injured workers' legislation, February 01, 2018

ployment status wherever possible. The term "accommodation" is generally used to refer to a durable placement that is not transitory. This is contrasted with what is often referred to as light duty or selective employment which is a transitory process to a temporarily disabled worker although it may also assist that worker in securing accommodation to suitable and durable employment in the long term.

The second lesson from *Caron* is that it is important for the Board to respect the jurisdiction of the Human Rights Tribunal while at the same time meeting its own responsibility to workers under section 16 of the Act. The Human Rights Tribunal has a primary responsibility and the appropriate tools to adjudicate the duty to accommodate under their legislation and the Board should not infringe on that jurisdiction. The Board must respect the rights and obligations of employers and workers under the Human Rights legislation and must be transparent in articulating that respect.

The final point I take from *Caron* is that the Board's support to employers and workers in meeting their obligations under the duty to accommodate should harmonize to the extent possible with that obligation under the Human Rights legislation without infringing on it or interfering with it. This approach is consistent with the Board's current commitment under section 16 of the Act. It can also assist the worker and employer in achieving a just accommodation in a way that avoids a protracted and expensive adversarial dispute before the Human Rights Tribunal.

In light of *Caron*, it is important for the Board to explicitly recognize the duty to accommodate under the Human Rights legislation while respecting the separate jurisdiction of the Human Rights Tribunal to enforce its legislation without interference from the Board.

### *Board Policy for Vocational Rehabilitation (VR)*

Board policy for VR is set out in Chapter 11 of the RSCM II. Given that the Board has broad discretion under section 16 of the Act, it is helpful if these policies as a whole promote VR practices which support key goals noted above. I make recommendations regarding specific VR policies as follows:

### *Policy C11-85: Principles and Goals*

Board policy C11-85.00 provides a general overview to the Board's commitment to quality rehabilitation and outlines the principles and goals of vocational rehabilitation under section 16 of the Act.

In order to emphasize the importance of establishing a more worker-centred approach to this policy I offer the following recommendations for the Board of Directors' consideration under policy C11-85.00:

5. **I recommend that the Board of Directors consider enhancing the Board's approach to "Quality Rehabilitation" by amending policy C11-85.00 emphasizing an approach which may be summarized as follows:**

   *Quality rehabilitation recognizes that a safe and early return to work that maintains the dignity and productivity of a worker plays an important role in the worker's rehabilitation and recovery. The Board is committed to timely intervention to assist the worker and the employer achieve a successful return to work with the injury employer wherever possible including provision of accommodation supports and services where needed.*

   *Where a return to work with the injury employer is not possible, the Board will provide the necessary supports and services to assist in restoring the worker to suitable and available employment at the pre-injury earnings level wherever possible. Where re-employment results in a significant loss of earning capacity, rehabilitation services will assist the worker in securing compensation benefits that will minimize the losses resulting from the disability.*

   *The Board recognizes that there is a "duty to accommodate" injured workers under the BC Human Rights Code. The Board will carry out its responsibilities respecting the jurisdiction of the Human Rights Tribunal in addressing issues arising under the Human Rights Code.*

6. **I also recommend that the Board of Directors consider amending the section entitled "Quality Rehabilitation" in policy C11-85.00 to include a commitment to support early return to safe, productive and durable work that minimizes financial loss to the worker and incorporates the duty to accommodate as much as possible.**

7. **I recommend that the Board of Directors consider amending the "Principles" in policy C11-85.00 to include a principle that vocational rehabilitation assistance may be initiated without delay in conjunction with medical treatment and physical rehabilitation where there is evidence of barriers to return to work with the injury employer.**

8. **I recommend that the Board of Directors consider including a principle that sufficient vocational rehabilitation supports will be provided to ensure that workers can successfully compete when they return to employment.**

Policy C11-85.00 also includes a section on "Goals" which could be amended to emphasize the Board's overriding commitment to support durable, long-term employment with the injury employer wherever possible. In support of this objective:

9. **I recommend that the Board of Directors consider including an overall goal for the Board's vocational rehabilitation program to provide the necessary supports and services to workers and employers to achieve durable, long-term employment with the injury employer wherever possible and, where return to suitable work with the injury employer is not possible, provide the necessary supports and services to assist in securing suitable alternate employment that restores the worker's pre-injury earnings where possible.**

It is not only important for the Board to articulate its commitment to recognize and respect the jurisdiction of the Human Rights Tribunal, but also to defer to that jurisdiction in appropriate circumstances. This is a complex and sensitive matter and should be carried out in a manner where the Board retains its responsibilities to continue to support the worker under section 16 of the Act.

It should also be recognized where the employer and the union are parties to an accommodation arrangement under the Collective Agreement, the same "duty to accommodate" issue may be addressed through the grievance/arbitration process. Although a decision by an arbitrator or the Labour Board does not oust the jurisdiction of the Human Rights Tribunal, it frequently renders it unnecessary.

Therefore, as a practical matter, it seems reasonable for the Board to adopt the same approach for all accommodation disputes, whether the dispute arises at Human Right Tribunal or through a grievance/arbitration proceeding.

One of the options the Board of Directors may wish to consider is that where a dispute regarding the "duty to accommodate" is established, either under the Human Rights legislation or under a collective agreement, that the Board make a "preliminary determination" on a rehabilitation plan under section 16 and Board policy #96.21. The Board could then base the rehabilitation plan on the accommodation if one is offered and on the lack of an accommodation if one is not offered. This approach would allow for review and reconsideration of the preliminary determination once the accommodation dispute is resolved without infringing the 75-day rule in section 96(5).

*Policy C11-88.00 - Nature and Extent of Programs and Services*

It is well established that maintaining the employment connection following an injury improves the likelihood of securing a suitable accommodated position with the injury employer. To facilitate this connection policy C11-88.00 could be amended to reinforce "early intervention" support:

10. **I recommend that the Board of Directors consider amending the "Early Intervention" section in policy C11-88.00 state that vocational rehabilitation assistance will be available to the worker to restore the employment connection with the pre-injury employer where possible as soon as the worker is medically able to participate in his or her own vocational future.**

*Vocational rehabilitation plan*

In keeping with the guidance regarding durable accommodation in the *Caron* judgement and where possible to limit the worker's loss of earnings:

11. **I recommend that the Board of Directors consider amending the "Vocational Rehabilitation" section of policy C11-88.00 to include the overall vocational goal of restoring the worker to safe, productive and durable suitable employment as close to his or her pre-injury earnings as possible.**

12. **I also recommend that the Board of Directors consider amending this section to include a commitment that the plan have a reasonable probability of achieving and sustaining the vocational goal over the long term.**

To provide a measure of flexibility with the vocational plan to ensure that the plan can be adjusted to the changing needs of the worker:

13. **I recommend that the Board of Directors consider amending this section of policy C11-88.00 allow the VR plan to be amended where there are significant developments in the vocational rehabilitation process, indicating the vocational goal is unlikely to succeed.**

Lastly, some confusion may arise in policy C11-88.00 as a result from the inclusion of the provisions for wage loss equivalency under the heading "Discontinuation of Vocational Rehabilitation Services" in this policy.

To support the VR goals in this policy, it is helpful to state what is often the practice - that there is a continuity of wage-loss equivalency where there is a significant gap between the discontinuation of temporary disability benefits and completion of permanent disability entitlement. Therefore:

14. **I recommend the Board of Directors consider adding a new heading "Payment of Wage Loss Equivalency Benefits" to this policy.**

15. **I also recommend that the Board of Directors consider amending policy C11-88.00 to specify that wage loss equivalency benefits may apply after temporary wage loss benefits have been concluded and suitable employment is not available while the worker is awaiting permanent disability assessment under section 23 of the Act or is awaiting or undertaking specific vocational programs.**

Policy #115.30 provides for exclusions for some types of claim costs from consideration under the employer's experience rating charges. For example, injuries covered by policies C11-88.10, *Work Assessments*, C11-88.40, *Training- on-the-Job*, and C11-88.50, *Formal Training* attract relief under section 42 of the Act.

The rehabilitation costs associated with restoring an injured worker to suitable employment with the injury employer are often far less than the cost of providing the training and supports necessary to place a worker with a different employer in a different occupation. The injury employer also incurs its own costs as part of meeting their accommodation responsibilities. A safe, durable accommodation by the injury employer can be considered a win, win, win situation:

- the worker gains the benefit of retaining his or her connection with the workplace and co-workers;
- the employer retains an experienced employee;
- and the Board benefits by reduced costs to the accident fund and reduced demands on staff resources.

To encourage and support the timely accommodation of an injured worker with the injury employer:

16. **I recommend that the Board of Directors consider provision for relieving the employer of the rehabilitation costs associated the accommodation under policy #115.30 so long as the accommodated employment is durable and long term. The employer should be relieved of the costs if the accommodation is considered successful 12 months after its inception.**

My recommendations for enhancing the level of engagement for vocational consultants in the system will require additional resources to accomplish this successfully. It will take more than additional positions to succeed. The Ontario WSIB undertook a similar initiative in 2012 that has been very successful. Ms. Evie DoCouto, WSIB Vice President, Return to Work Program, attributes Ontario's success to three factors: strong support from the WSIB leadership; collaboration with the workplace partners; and a professional vocational rehabilitation staff.

The WSIB utilized the disability standards developed by the National Institute for Disability Management and Research (NIDMAR) to build a cadre of capable vocational rehabilitation professionals to deliver their services. I would recommend that the BC Board continue to collaborate with the WSIB to gain insights from their successes and their delivery model.

Certified Disability Management Professionals have played a key role in the WSIB program's success particularly in handling complex cases. WSIB supports all their return to work specialists in achieving the internationally recognized CDMP certification through NIDMAR. The Board of Directors may wish to consider a similar commitment to professional certification.

*Light duty and return to work*

Section 5(2) of the Act provides:

> Where an injury disables a worker from earning full wages at the work at which the worker was employed, compensation is payable under this Part from the first working day following the day of the injury.

The payment of compensation is based on medically confirmed evidence of disability, and where the Board receives medical evidence that the worker is unable to continue at the work at which he was employed, compensation is payable. Selective/light employment is a subset of section 5(2) and does not automatically displace it because there is an offer of light duties.

It is generally accepted that the earlier a worker is able to return to safe and productive employment following an injury, the more likely he or she is to retain employment with the injury employer when full recovery or maximum medical improvement is achieved.

The offer of light duties by the employer often occurs immediately following the injury so long as the work is medically appropriate and productive. It has the advantage to the worker of continuing his or her wages without interruption. The employer gains from this arrangement because there is no payment of wage loss benefits to impact the employer's experience rating. The Board gains because the administration of a claim with no wage loss benefits is less complex. These "wins" are dependent on whether the light duty employment is safe and productive for the worker and will not slow the recovery or worsen the resulting disability.

When fairly administered, suitable light duty employment can play an important role in a worker's recovery and recognizes the value of maintaining an injured worker's positive connection to the workplace.

The current policy requires that:

- The worker must be capable of undertaking some form of suitable employment.
- To be suitable, the employment must be safe and must not risk further harm to the worker or slow his or her recovery.
- The work must be productive. Token and demeaning tasks are considered detrimental to the worker's recovery.
- Where the forgoing requirements are met within reasonable limits, the worker must agree to the light duty arrangement.

Where the worker and/or the worker's physician disagree that the light duties meet these policy requirements, the Board is required to investigate and determine the safety of the work after considering the medical evidence and other relevant information. The Board may initiate the investigation in response to notification by the worker or the employer or may initiate its own investigation where it considers further inquiry is indicated.

The policy specifies that the Board's evaluation will be based on, but not limited to, a detailed description of the employment being offered, including the physical requirements and detailed medical information outlining the workers medical restrictions, physical limitations and abilities. The Board officer then determines whether the light duty offer meets the policy criteria outlined above.

The current employer's report of injury (Form 7) asks the employer if modified or transitional duties are available to the worker and if so to provide a description of these duties in a 2-3 inch square box on the form. It would be more appropriate in light of policy #34.11 to request the employer provide a copy of the light duties that have been offered to the worker and ask if a copy of that offer has been provided to the worker. This will ensure that the Board has reliable information on which to initiate an investigation if one is required. Where a copy of the light duty offer has been provided to the worker, the Form 7 should also indicate whether the worker has been asked to provide that offer to his or her treating physician for approval of those duties.

Many large employers have well established disability management programs that provide suitable light duty employment on a proactive basis. The success of these programs depends on the employer's commitment to provide safe productive employment in accordance with available medical evidence and the worker's individual circumstances. Cooperation with the workplace partners including a union where one is available provides the basis for building a trust relationship for this program. Larger employers often have a greater degree of flexibility in arranging light duties. Medium and smaller employers don't always have this flexibility.

To assist medium and smaller employers with accommodating the injured worker in suitable light duties I recommend that the employers report of injury contain a new question after the question, "Have any modified or transitional duties been offered to the worker?" to read, "If no, can the Board be of assistance to the employer in arranging suitable employment for the worker?"

The Abilities and Limitations Form outlined in recommendation #1 provides a valuable supplementary source of clinical evaluation for determining the suitability of light duties offered by the employer. Where the physician's report of injury (Form 8/11) does not contain sufficient information to determine whether the light duty offer is safe and will not delay the worker's recover or worsen the condition, the board officer can provide the treating physician with the employer's light duty description and request an evaluation of the worker's suitability for those specific duties. In appropriate circumstances the Board can ask the physician to complete an Activities and Limitations Form to provide a more detailed clinical evaluation of the suitability of the physical requirements.

Policy #34.11 states:

> Should the Board determine that the worker's refusal is unreasonable, benefit entitlement is determined under section 30 of the *Act*. For example, the worker does not provide the selective/light duties to the attending physician or the worker refuses to return to work after the physician has determined the duties are suitable. Benefit entitlement will be adjusted effective the date the selective/light employment was suitable and available, as determined by the Board.

This policy is clear on how cases are handled where the worker unreasonably refuses to cooperate with the employer's effort to arrange light duty employment that complies with policy #34.11. In that case, the light duty is deemed to comply with section 30 on the date it was offered and benefits, if any, are paid accordingly. However, in my view this policy does not adequately address the situation where the worker has a reasonable basis to believe that the policy requirements have not been met. What is unclear in policy #34.11 is whether the worker continues to receive wage loss benefits while the investigation on the reasonableness of his or her refusal is carried out.

A worker-centred approach would not penalize the worker for raising a reasonable concern with respect to whether the light duty offer meets the policy requirements that was

sufficient to initiate an investigation. In my view, where the worker provides a reasonable concern about the viability of a light duty position and there is medical evidence confirming that the worker is disabled from the work at which he or she was employed, then wage loss should continue to be paid while the investigation is carried out. That is consistent with the requirements of section 5(2) of the Act and the requirements in policy #34.11. However, where the worker unreasonably refuses to cooperate with the employer's efforts to establish a viable light duty position that complies with policy #34.11, then deeming the light duty position when it was formally offered is appropriate and in accordance with the Act and the policy requirements.

This approach puts the onus on the Board to initiate and complete the investigation without delay. Where a reasonable dispute arises regarding the compliance of a light duty offer, the first step is for the employer to provide the Board with a detailed description of the employment being offered either at the initiative of the employer, or at the request of the Board officer where it is not otherwise provided by the employer. Where the medical evidence provided by the treating physician is not sufficient to resolve the matter, the Board officer can request that the physician carry out a thorough examination and complete the "Abilities and Limitations Form" as detailed in the "Medical Evidence and Evaluation of Disability" section of this report.

Where further investigation is required, it is up to the Board officer to determine the nature and extent of the investigation and to arrive a fair resolution for all parties. In my view, this is a critical point in the claim. The Board's initiative and support can determine whether the worker is accommodated by the employer or whether the Board's involvement will focus on assisting the worker in finding alternate employment with a different employer. The latter course is more uncertain, challenging and difficult for the worker, and incurs greater expense borne by the accident fund and ultimately the employer. The Board's involvement at this point can make the difference between a successful re-employment outcome with the injury employer or an ongoing Board engagement with the worker to find alternate employment, often accompanied by disputes, appeals and the non-therapeutic adversarial process.

To facilitate a successful non-adversarial resolution of a reasonable dispute over the suitability of light duties:

17. **I recommend that the Board of Directors consider amending policy #34.11 to provide for a careful investigation of the dispute and where appropriate engage a vocational rehabilitation consultant or occupa-**

**tional therapist to meet face to face with the parties to facilitate an accommodation acceptable to both the worker and the employer where so directed by the case manager or requested by the employer or worker.**

18. **I also recommend that the Board of Directors consider amending this policy to indicate where there is medical evidence that the worker is disabled from the work at which he or she was employed during the investigation process, the Board continue to pay wage loss benefits to the worker while the investigation is concluded.**

19. **Finally, I recommend that the Board of Directors consider a further amendment to indicate that where a successful accommodation is achieved after investigation, that the costs associated with vocational rehabilitation expenditures and with the associated wage loss payments while the investigation is being carried out be borne out of the accident fund generally and not charged to the employer's experience rating account. The authority for this cost adjustment is found in section 42 of the Act.**

*Claim Suppression*

During the course of my consultations some representatives of the worker community expressed concerns about what they consider to be misuse and in some cases abuse of light duties and in some cases bordering on claim suppression. These concerns included:

- threats of dismissal if the worker filed a claim for wage loss;
- assigned to non-productive "work" in the lunchroom;
- punch in on time clock then allowed to go home for the day;
- use of mandatory drug testing when reporting an injury as a means of suppressing a claim.

One representative contended that, "the difficulties people have in applying for compensation...had the effect of suppressing claims." Another representative submitted, "suppression comes more from the case managers, vocational rehabilitation consultants and [Board medical advisors]... than employers." I have included a first-hand case study in Appendix C which was submitted by a third representative to illustrate this point. The

case study of this firefighter with a PTSD condition also has relevance for two recommendations I make later in this review.

Some representatives urged me to meet with individual workers to investigate and confirm these abuses. I declined to do so. I consider engagement with and investigation of individual cases is beyond the scope of my mandate. However, I do not consider it appropriate to dismiss their concerns without comment.

It is contrary to section 177 of the Act for an employer to pressure a worker from reporting a claim to the Board. That section provides:

> An employer or supervisor must not, by agreement, threat, promise, inducement, persuasion or any other means, seek to discourage, impede or dissuade a worker of the employer, or a dependant of the worker, from reporting to the Board
> (a) an injury or allegation of injury, whether or not the injury occurred or is compensable under Part 1,
> (b) an illness, whether or not the illness exists or is an occupational disease compensable under Part 1,
> (c) a death, whether or not the death is compensable under Part 1, or
> (d) a hazardous condition or allegation of hazardous condition in any work to which this Part applies.

Interfering with a worker's statutory right to entitlement to compensation is a serious violation of the Act and may attract penalty consideration under section 196 of the Act. The Board has a statutory duty and fiduciary trust to workers to protect their right to make a claim free from interference by employers.

Section 13 of the Act also prohibits workers from agreeing to waive or forgo any benefit entitlement under the Act. That section states:

> A worker may not agree with his or her employer to waive or to forego any benefit to which the worker or the worker's dependants are or may become entitled under this Part, and every agreement to that end is void.

Policy # 94.20 addresses the employer and supervisor prohibitions under section 177 of the Act and the possibility of an administrative penalty that may be calculated on the basis of the criteria in item D12-196-6 in the Board's *Prevention Manual*. What appears to

be missing in policy #94.20 is adjudicative direction and guidance on what steps a board officer is to take when an allegation of a violation under section 177 of the Act is raised. Given the seriousness of a violation of section 177 of the Act and the complexity of the possible remedy under section 196 of the Act:

20. **I recommend that the Board of Directors consider amending Policy #94.20 to indicate where an allegation of a violation under 177 of the Act is raised, the Board officer will document that allegation and refer it to the Board's Legal Services Division for direction and guidance.**

The issue of claim suppression is fraught with allegations that are difficult to document. The very fact that these activities are not openly practiced is because they are prohibited by the Act. Where there are serious allegations of violations of section 177 of the Act, the Board has a duty to respond. However, the Board's response should be proportionate to the nature and extent of the problem. Determining the nature and extent of the problem is the challenge.

This problem has been addressed systematically by other workers' compensation boards. For example, the Manitoba Workers Compensation Board released a comprehensive report[15] that indicated claim suppression occurs in approximately 6% of workplace injuries, which represents approximately 1,000 claims per year. This empirically based study reported on four separate survey measures indicating that employer "overt claims suppression" ranged from 6.0% up to 29.8%. These findings led to measures taken by the Manitoba WCB to address this issue.

Given the importance of this issue and the difficulty in evaluating the nature and extent of this problem on an anecdotal basis:

21. **I recommend that the Board of Directors consider initiating an independent review of this issue by a qualified organization with a scientific methodology to determine whether and to what extent claims suppression is a significant issue in the BC workers' compensation system.**

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[15] "Claim Suppression in the Manitoba Workers Compensation System", Nov. 2013; Prism Economics and Analysis.

## PERMANENT DISABILITY ENTITLEMENT

*Referral for Permanent Disability Evaluation*

The transition from temporary disability benefits to permanent disability benefits is a critical period in the claim for the injured worker. This transition typically occurs at "plateau" when the medical evidence indicates the worker has reached maximum medical improvement from the compensable injury and the remaining conditions have reached a plateau of recovery.

Under current policy, there is little guidance regarding decision-making procedures at this important point in the claim. The current practice is that the Board officer consider possible permanent disability entitlement at the time of plateau. It is the responsibility of a case manager to determine what permanent conditions are accepted on the claim and whether the claim should be referred to the disability awards department to assess the worker's entitlement for these accepted conditions under section 23(1).

If permanent conditions are accepted, the Board officer will also usually adjudicate whether the worker can return to his pre-injury job without assistance or whether there should also be a referral to vocational rehabilitation (VR) to explore employability options. Finally, at the time of plateau, the Board officer may or may not adjudicate whether the worker is entitled to a loss of earnings (LOE) assessment, based on whether his loss of earnings from his injury is "so exceptional". In practice, early LOE decisions may or may not be included in plateau decisions.

Ideally, prior to the termination of temporary disability benefits, the Board will have had an opportunity to determine whether the worker can return to work with the injury employer either to the pre-injury job or to some accommodated position with the injury employer. Where the worker is able to return to the pre-injury job, full-duties or with an accommodation, that is an indication that the worker may not need a referral to VR or may not be entitled to an LOE assessment. Where there is a clear indication prior to the plateau date that the worker is unable to return to work with the injury employer, an early referral to the vocational rehabilitation consultant to initiate a rehabilitation plan should be initiated if this has not already been done to avoid delays in the pension assessment process.

Prior to the changes to the statute in 2002, then policy #96.20 in the RSCM I offered guidance to Board officers regarding the approach used to refer cases to the disability

awards department for assessment of permanent disability or potential permanent disability. That former policy provided:

> To ensure consistent referrals of all cases where there is a potential disability, the Board officer is required to send the file to the Disability Awards Department for further evaluation where any of the following guidelines apply:
>
> 1. Where a medical report indicates that a permanent disability exists or that there is a possibility a permanent disability exists.
>
> 2. Where a worker indicates there is a permanent disability as a result of the compensable injury, or states there is an inability to return to employment as a consequence of the injury.
>
> 3. Where there is any other indication of a permanent disability or potential permanent disability.
>
> If there is any doubt about the existence of a permanent disability, these claims are referred to the Disability Awards Department for final consideration. Board officers, however, are expected to exercise discretion and common sense in deciding whether to refer a worker's claim to the Disability Awards Department, it is up to the Board officer to clearly delineate by memo the status of the claim and to confirm what conditions have been accepted.

Policy #96.30 in RSCM I also specified:

> It is the responsibility of Disability Awards Officers and Adjudicators in Disability Awards to determine whether a worker's injury or occupational disease has caused a permanent disability. They then decide the extent of the disability and calculate the worker's permanent disability award entitlement. Policy also provides that Disability Awards Officers and Adjudicators in Disability Awards must accept the final decision of the Board officer as to what conditions are accepted under the claim.

In 2004 a Board discussion paper 16 advanced a new approach and recommended that policy #96.20 be amended to read:

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16 See the Board's 2004 "Discussion Paper: Referral to Disability Awards."

> The Board officer determines when temporary total disability or temporary partial disability benefits are concluded, and whether an actual or potential permanent disability is accepted on the claim. These decisions are generally made on the basis of information supplied by a treating physician, qualified practitioner, consulting specialist or and/or the injured worker. Treating physicians and qualified practitioners are required to send periodic reports to the Board outlining the worker's condition. These reports include a question which asks specifically whether there will be any permanent disability resulting from the injury.
>
> In those situations where a Board officer determines that an actual or potential permanent disability does not exist, and this decision is contrary to the attending physician's opinion or the worker's own opinion on the matter, then a decision is to be provided to the worker, setting out the status of the claim. If the worker is not satisfied with the Board officer's determination, a review of the decision may be requested.
>
> If an actual or potential permanent disability is accepted on the claim, the Board officer will refer the file to the Disability Awards Department for an assessment of the extent of the disability.

In the current version of the RSCM II, policy #96.20 has been completely removed from the manual and specific reference to the evidence of the worker and the treating physician has been eliminated from the policy. Policy #96.30 now simply reads:

> The Board determines whether an actual or potential permanent disability is accepted on a claim.

The changes to policies #96.20 and #96.30 reflect the changes in Board practice, not just about who makes the permanent disability decision but also on what basis or evidence it is made. Under the current policy (#96.30), the Board officer makes this decision but there is no specific policy direction to seek the input of the worker or the treating physician on this decision. It is at this critical point in the claim when it is important to have policy direction on the nature and extent of the investigation to be carried out. Failure to ensure that all relevant evidence is considered prior to the Board officer making this important decision can lead to unnecessary reviews, appeals and referrals back to the Board for further investigations.

The lengthy delay to go through the appeal process just to have the evidence of the worker and treating physician fully and fairly considered takes an inordinate toll on the worker. The legal maxim "justice delayed is justice denied" applies. More importantly, the non-therapeutic impact on the worker to be forced into the adversarial process only to have the worker's evidence and the treating physician's evidence and opinion considered is the contrary to what a worker-centred approach should provide.

The evolution of policy #96.20 where the evidence of the worker and the treating physician were given a significant role to the current approach where the policy does not specifically refer to the role of the worker and physician's evidence is the difference between a worker-centred approach and a strict case management approach under the current policy.

In order to restore a more worker-centred approach to this important decision and to fully consider the evidence of the worker and the treating physician in making a decision to refer the claim for permanent disability for assessment:

22. **I recommend that the Board of Directors consider a new policy #96.20 to indicate that when the worker's injury is reaching maximum medical improvement and there is some evidence of a potential permanent disability, the Board officer will request that the treating physician or specialist complete an Activities and Limitations Form (ALF) with a copy to the worker and give the worker an opportunity to provide any further evidence regarding the existence of an actual or potential permanent disability.**

Where the worker continues to be disabled from performing the full duties of the work at which he or she was employed at the time of injury, this may be an indication that there is a level of ongoing disability from the injury.

23. **I also recommend that the Board of Directors consider amending policy to indicate that the Board officer will consider the evidence of the worker and the worker's physician and where there is substantial evidence from the treating physician and from the worker that the worker has a potential permanent disability, this evidence will be given significant weight unless there is conclusive evidence to the contrary. Where the Board officer determines that the worker has a permanent disability, the**

**Board officer will refer the worker's claim to Disability Awards for an assessment of that disability under section 23(1).**

*Loss of Earnings Assessment*

The mandatory method for determining a worker's permanent disability entitlement is contained in section 23(1) of the Act. As pointed out in policy # 39.00 the percentage of disability determined for the worker's condition under section 23(1)(a), is intended to reflect the extent to which a particular injury is likely to impair a worker's ability to earn in the future.

Section 23(3) of the Act provides the Board with a discretionary method to determine whether the assessment of disability under section 23(1) appropriately compensates the worker for the impact of the disability on the worker's ability to earn in the future. The addition of a new section 23(3.1)and (3.2) to the act in 2002 introduced a new prerequisite for considering a loss of earnings pension under section 23(3) of the Act. The provisions of section 23(3), (3.1) and (3.2) are reproduced below to provide reference for my consideration of this issue.

Section 23(3) of the Act provides if:

(a) a permanent partial disability results from a worker's injury; and
(b) the Board makes a determination under subsection (3.1) with respect to the worker;

the Board may pay the worker compensation that is a periodic payment that equals 90% of the difference between

(c) the average net earnings of the worker before the injury, and (d) whichever of the following amounts the Board considers better represents the worker's loss of earnings:
(i) the average net earnings that the worker is earning after the injury;
(ii) the average net earnings that the Board estimates the worker is capable of earning in a suitable occupation after the injury.

(3.1) A payment may be made under subsection (3) only if the Board determines that the combined effect of the worker's occupation at the time of injury and the worker's disability resulting from the injury is so exceptional

that an amount determined under subsection (1) does not appropriately compensate the worker for the injury.

(3.2) In making a determination under subsection (3.1), the Board must consider the ability of the worker to continue in the worker's occupation at the time of injury or to adapt to another suitable occupation.

The provisions in the Act may be summarized as follows:

First, there is an assessment of the worker's entitlement under section 23(1) of the Act to determine the nature and extent of the disability resulting from the injury.

Next, the Board makes a determination under section 23(3.1) as to whether the impact of the worker's disability on his or her ability to continue in the pre-injury occupation is "so exceptional" that the amount determined under section 23(1) does not appropriately compensate the worker for the injury. The "so exceptional" test, under section 23(3.2) requires the Board to consider the ability of the worker to continue in his or her occupation at the time of injury or to adapt to another suitable occupation.

If, and only if, the combined effect of the worker's occupation and the worker's disability resulting from the injury is so exceptional (under sections 23(3.1) and (3.2)) that an amount determined under section 23(1) of the Act does not appropriately compensate the worker for the injury, will the Board consider possible loss of earnings entitlement under section 23(3) of the Act.

The determination of the worker's disability resulting from the injury under section 23(1) is integral to the application of section 23(3.1) and (3.2) and logically precedes it. A plain reading of the Act does not require an application of the "so exceptional test" before the section 23(1) assessment of the nature and degree of the permanent disability. In fact, the reference in section 23(3.1) to "the worker's disability from the injury" is an indication that the determination of the assessment of the nature and extent of the worker's injury under section 23(1) should precede the application of the so exceptional test.

*The two-step process for section 23(3) consideration*

The Board has somewhat different policy requirements for each of the two steps involved in the determination of a loss of earnings pension under section 23(3), using pol-

icy #40.00 for determining matters under sections 23(3.1) and (3.2) and then policy #40.12 for determining matters under section 23(3). The use of different policies effectively creates a "two-step" adjudicative process for the worker, leading to complexity and delay. The actual terms of policy #40.00 at the first step have also been the source of numerous challenges at WCAT and in the courts.

The expansive role of policy #40.00 in the first step under section 23(3.1) and (3.2) was addressed at length in the BC Court of Appeal judgement in *Jozipovic v. British Columbia (Workers' Compensation Board)* 2012 BCCA 174. Following that judgement, the Board made some adjustments to policy #40.00 in response to the court's concerns.

More recently, in the BC Supreme Court judgement in *Shamji v. WCAT* (2016 BCSC 1352) Justice Voith detailed a range of concerns with respect to the Board's application of section 23(3.1) and (3.2) in determining the worker's loss of earnings pension and the amount of that pension. His first concern is that the first step in the assessment process - the decision on eligibility for an LOE pension can be negated in the second step on the "assessment" of that pension under section 23(3). Justice Voith observed:

> This is particularly curious, and I would say irrational, when the very issue of eligibility is predicated on a finding that an injured worker's loss of income is "significant" or his or her circumstances are "so exceptional" that an assessment of that loss is necessary or appropriate. [105]

He also observed:

> ...that the present process, or the way the process is implemented, has the prospect of excluding potentially meritorious claims for an LOE pension. It is equally possible that a worker would not meet the stage one eligibility threshold based on average incomes or figures, but would have done so if that worker's actual income had been used. [106]

Justice Voith went on to state:

> While these separate inquiries may be logical, the fact remains that, in combination, the overall scheme is unwieldy, inefficient, and cumbersome. This is particularly so when one considers that the Act is intended to serve injured workers. [109]

In a March 1, 2018, judgement the BC Court of Appeal [*Shamji v. Workers' Compensation Appeal Tribunal*, 2018 BCCA 73] three justices upheld the judgement below noting:

> The reviewing judge, expressing concern about the implications of his conclusion on the two- stage process, questioned why a worker would have to establish eligibility for an LOE assessment based on one set of figures, only to be subsequently told that he had no right to such a pension where the decision maker on that assessment chose to use different figures. He also questioned why a worker should go through these different stages given the length of time this matter had taken, with multiple hearings at each stage. [64]
>
> I certainly appreciate the observations of the reviewing judge. As this case demonstrates, the compensation system in the Act can be slow, cumbersome and frustrating to workers. However, part of this stems from the nature of a process that evaluates a worker's disability, provides vocational rehabilitation where appropriate, and assesses what losses have resulted from an impairment of earning capacity. An initial assessment of functional impairment under s. 23(1) is not made until a worker's injury has "plateaued". It is only after this has been done that consideration can be given to an LOE under s. 23(3). [67]

The BCCA judgement also acknowledged that a two-step process was permissible under the Act consistent with the prior BCCA judgement in *Preast v. Workers' Compensation Appeal Tribunal,* BCCA (September 9, 2015). The concerns of the court reflect some of the same concerns for a worker-centred approach.

In 2017 the Board's Workers' and Employers' Services Division initiated a review of the decision-making process for the section 23(3) loss of earnings. This initiative arose from recognition that there were inconsistencies in the decision-making process that were resulting in a high volume of reviews and appeals and a high rate of appellate returns that required further investigation and new decisions. In addition to the impact of the resulting delays for the worker, these returns were resulting in a significant amount of rework for vocational rehabilitation consultants.[17]

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[17] For example, the Division estimates there are approximately 3,000 vocational rehabilitation plans per year and approximately 1,000 LOE awards expected. There are also approximately 1,400 Review Division reviews per year in relation to vocational rehabilitation plans and section 23(3) decisions. A review of 846 Review Division decisions had a return rate of 42% for further information or investigation.

The Board is in the process of rolling out an improved decision-making process for section 23 loss of earnings cases following review of WCAT and Supreme Court decisions, discussions with Review Division representatives, and information from Board staff. The following recommendations are intended to complement and supplement the Board's initiative to develop a "Comprehensive Framework for Quality Decision Making" under section 23(3) of the Act. This "Framework" provides an important step forward to bring a more transparent and proactive approach to the decision-making process that will improve consistency to section 23(3) decisions and hopefully reduce appeals from these decisions.

*Application of policy in section 23(3) appeals*

The two critical terms to consider in the application of current policies are "suitable occupation" and "appropriate compensation." Clear and consistent definitions of these terms are necessary for adjudicative direction and guidance for implementing this very important provision of the Act that affects the most seriously disabled workers. It is also important that the two policies be consistent and integrated, to avoid the adjudicative difficulties and the barriers to workers noted by the courts.

*"Suitable Occupation"*

With respect to "suitable occupation," policy #40.12 outlines the considerations that the Board must take to arrive at a conclusion of employment that the worker could be expected to undertake over the long term including medical evidence of the limitations imposed by the disability as documented by the permanent disability assessment under section 23(1). As noted earlier Policy #40.00 provides a more general definition of suitable occupation.

In order to provide consistency in policy with respect to the determination of a suitable occupation:

**24. I recommend that the Board of Directors consider amending the definition of suitable occupation in policy #40.00 to indicate that a suitable occupation is one that the worker has the physical ability to perform, has the necessary knowledge and skills to be competitively employed in that occupation given all the worker's circumstances, and actual employment in that occupation is reasonably available to the worker in the long term. It would also be helpful to reference policy #40.12 which**

**provides detailed guidelines in determining suitable and reasonably available occupations for a worker.**

*Appropriate Compensation/ "Significant Loss of Earnings"*

Policy #40.00 provides that section 23(1) may not appropriately compensate a worker where the worker cannot continue in a suitable occupation with a "significant loss of earnings".

Policy #40.00 also provides that in determining whether a worker is experiencing a significant loss of earnings, the Board takes into consideration the difference between the worker's pre-injury earnings and the combined total of the worker's post-injury earnings and the amount awarded under the section 23(1) method of assessment. However, the policy does not provide a specific percentage of loss that would constitute a "significant" loss. That is left to policy directive C6-2 which states that the Board:

> ...recognizes that a "significant loss of earnings" exists where the difference between the worker's pre-injury earnings against the combined total of the post injury earnings and the amount in the section 23(1) award is at least 25%.... [and] "does not exist where the calculated result is 5% or lower.

That practice directive, which is not a policy of the Board of Directors, acknowledges that a lower figure than 25% may represent a significant loss of earnings. The practice directive indicates that a 10% difference in the pre and post-injury earnings may represent a significant loss in some circumstances.

It is important to keep in mind that the workers' average earnings are already discounted by 10% based on the 90% of net calculation. In addition, the Board includes the amount the award of the section 23(1) assessment in the calculation of the post- injury earnings. The inclusion of CPP benefits and the general age 65 retirement date also impacts the worker's entitlement. Permanently disabled workers are further disadvantaged by their reduced capacity to compete in the general labour market. They face the uncertainties of fluctuations in the economy that leave disabled workers more vulnerable to unemployment than workers without a disability.

To provide a greater degree of consistency in the application of sections 23(3.1) and (3.2) and a more worker-centred recognition of the significant impact of the permanent disability on the worker's future earning capacity:

25. **I recommend that the Board of Directors consider amending policy #40.00 to recognize that a "significant loss of earnings" exists where the difference between the worker's pre-injury earnings against the combined total of the post injury earnings and the amount of the section 23(1) award is at least 10% and also to recognize that a significant loss of earnings does not exists when the calculated result is 5% or lower and further, where the evidence shows that worker's individual circumstances indicate that a loss between 5% and 10% is significant for that worker the Board may determine the worker's entitlement under section 23(3).**

Finally, there is no compelling reason why the determination on the so exceptional test (under section 23(3.1) and (3.2)) cannot be made at the same time as the decision on the loss of earnings decision (under section 23(3)). This would remove the confusion often arising from the separate two-step process. Further, it is important to have the adjudications in the two inter-related decisions made on a consistent basis, for the reasons set out by the court, unless there is compelling evidence to the contrary.

In order to streamline and rationalize the Board's consideration of possible loss of earnings entitlement under section 23 of the Act and to make the assessment process more worker-centred:

26. **I recommend that the Board of Directors consider amending policy to indicate where the Board determines that the worker satisfies the requirements of sections 23(3.1) - that the worker's disability is "so exceptional" - the Board will make a determination in the same decision regarding the worker's entitlement to a loss of earnings pension under section 23(3) and use the same findings of fact as the basis for both decisions.**

*Chronic Pain*

There are no sections of the Act specific to chronic pain: the condition is adjudicated under policies #22.00 and #39.02. Policy #39.02 defines permanent chronic pain as pain which persists longer than six months and is either disproportionate to the injury or is non-specific. Under this policy, chronic pain is rated as a non-scheduled award at 2.5% impairment.

This policy states:

> Entitlement to a section 23(1) award for chronic pain may only be considered after all appropriate medical treatment and rehabilitation interventions have been concluded.

Policy #22.00 provides that, in "all" cases of (temporary) chronic pain (i.e. after six months), a multidisciplinary assessment must be undertaken. The purpose of this assessment is to assess causation and to provide an opinion on treatment. However, the policy also states that where chronic pain is considered to be "permanent" (i.e. after six months), it may be considered for disability benefits under section 23 of Act.

Policy #39.02 (for permanent chronic pain) also indicates that where the claim has been referred for a permanent disability assessment, the Board may arrange a multidisciplinary assessment to consider the worker's history, health status, the impact of the pain on physical functioning, psychological state, behaviour, ability to perform the pre-injury occupation and the activities of daily living to be used for determining acceptance of the claim.

Neither policy indicates that all necessary medical treatment and supports be identified before the assessment of the permanent disability evaluation is carried out. Rather, the definition of both temporary and permanent chronic pain as being "pain after six months" means that at the point that chronic pain is diagnosed, it may also be considered to be permanent.

There are many emerging treatment options that can assist the worker in coping with chronic pain. It is in the interest of the worker, employer and the Board to ensure that the worker has achieved maximal medical improvement for the chronic pain condition before the permanent disability assessment is carried out. This approach will maximize

the chances of a successful return to work once the recommended and appropriate treatment has been carried out.

27. **I therefore recommend that the Board of Directors consider an addendum to policies #22.00 and #39.02 to ensure that all necessary treatment to maximize the worker's ability to return to safe productive and durable employment has been carried out, before the worker is referred for a permanent disability assessment for chronic pain.**

In the course of my consultations I heard a wide range of concerns about how the 2.5% flat rating for all chronic pain conditions has failed to recognize the impact of this sometimes debilitating condition on workers. This "one size fits all" policy was raised time and again to illustrate the failure to recognize the merits and justice of the individual worker's case where significant chronic pain is identified by the treating health professionals. I was urged to recommend adoption of the Ontario model which compensates some chronic pain related diagnoses up to 90%. Others urged me to consider implementing the recommendation in the 2002 Core Review to provide a range of 0 - 20% for chronic pain.

The Board's Policy, Regulation and Research Division (PRRD) recently initiated a review of chronic pain policies and has embarked on an extensive pre-consultation process with stakeholders. A significant amount of information about the Board's policies and practices has been provided through this process. It is evident that the medical understanding and treatment of pain and chronic pain conditions have evolved significantly in the past 15 years. The PRRD is planning to include involvement of an expert panel as well as the stakeholders in its consultation process.

The Board is to be commended on its initiative to undertake a full review of this important issue. However, the PRRD review process is expected to take some time and the issue I must consider is whether there are some steps the Board of Directors can consider taking on an interim basis to provide a greater degree of fairness to the evaluation of chronic pain, particularly for the more serious cases.

The approach offered by Alan Winter in the Core Review has some merit. It utilized four categories for assessing permanent chronic pain:

- Mild 0-5%;
- Moderate 10%;

- Moderately Severe 15%; and
- Severe 20%.

This approach could be useful in distinguishing varying levels of disability from a chronic pain condition where a distinction is made between impairment and disability using a "biopsychosocial" model.[18] The approach advocated by some uses "activity limitation" as a basis for assessment rather than strict impairment.

I gave serious consideration to recommending this approach to the Board of Directors as an interim policy while the PRRD carries out the chronic pain policy review. The experience from such an interim policy could provide useful data and valuable information for the application of a more flexible approach that considers the experience of the worker.

In the end, however, I decided this option was not practicable. While it could provide a greater degree of fairness for individual workers who experience chronic pain going forward, its development and implementation would take time and it could take resources and focus away from the PRRD review while it was being implemented. The period following its full implementation would be limited.

The other issue arising under policy 39.02 that merits some consideration is the impact of the accepted chronic pain condition on the worker's ability to continue in the pre-injury occupation or to adapt to another suitable occupation. Typically, a low PFI (such as 2.5%) does not indicate a serious impact on employability. However, in the case of chronic pain, the single flat rate of 2.5% does not always reflect the impact it can have on the worker's employability, particularly for the more severe cases.

One way to address this inequity as an interim measure, particularly for the most serious chronic pain conditions, is to make provision in policy to allow for a loss of earnings assessment where the chronic pain condition meets the so exceptional test in sections 23(3.1 and 3.2) of the Act. No new program needs to be developed and no significant increase in Board resources would be required for this. This issue can be further addressed by the PRRD review and the experience from this addition can provide useful evidence when the PRRD considers this issue.

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[18] "Assessing Pain and Disability in the Pain Patient"; Feinberg,S.; Brigham, C.; Ensalada, TL.. In AMA Guides Newsletter, Jan./Feb. 2016 (available online at: http://www.coa.org/2016/presentations/qme/HenryAMAGuides.pdf)

**28. I recommend that the Board of Directors consider including a reference in policy 39.02 to indicate that in more serious chronic pain cases where it is established that the disability resulting the chronic pain condition is so exceptional that the section 23(1) award does not appropriately compensate the worker, the Board may consider the claim under section 23(3) of the Act.**

*Duration of Permanent Disability Pensions*

Section 23.1 of the Act makes provision for the payment of compensation for permanent disability entitlement under section 23.1 up to age 65 unless the Board is satisfied that the worker would retire at a later date. Section 23.1 specifically provides:

> Compensation payable under section 22(1), 23(1) or (3), 29(1) or 30(1) may be paid to a worker, only
>
> (a) if the worker is less than 63 years of age on the date of the injury, until the later of the following:
> (i) the date the worker reaches 65 years of age;
> (ii) if the Board is satisfied the worker would retire after reaching 65 years of age, the date the worker would retire, as determined by the Board, and
>
> (b) if the worker is 63 years of age or older on the date of the injury, until the later of the following:
> (i) 2 years after the date of the injury;
> (ii) if the Board is satisfied that the worker would retire after the date referred to in subparagraph (i), the date the worker would retire, as determined by the Board.

The Act does not provide any specific direction on how best to project the date when the worker would likely retire. That matter is left to the Board to determine through Policy. Policy #41.00 states:

> Where the Board is satisfied a worker would retire after reaching 65 years of age, section 23.1 permits the Board to continue to pay benefits to the age the

> worker would retire after the age of 65 **if the worker had not been injured.** (emphasis added)

The policy goes on to specify:

> When determining whether a worker would retire after age 65, the circumstances under consideration are those of the individual worker as they existed **at the time of injury.** (emphasis added)

The policy also requires evidence that is verified by an independent source to confirm the worker would work past age 65.

A search of WCAT decisions for "age 65 and 23.1" shows over 1,000 appellate decisions on this issue. There are also ten noteworthy decisions attempting to provide adjudicative guidance to appellate decision makers who have to wrestle with these sometimes difficult cases. WCAT noteworthy decision 2014-03091 provides a comprehensive summary of the legislative background informing section 23.1 of the Act and policy item #41.00 and is helpful in understanding the complexity of this issue and its application.

Policy #41.00 clearly limits the evidence which the Board may consider in a decision under Section 23.1. The policy does not provide clear rationale for these limitations.

I am particularly concerned about the policy requirement to limit consideration to evidence involving the circumstances of the individual worker **as they existed at the time of injury**. This by definition precludes consideration of the possible impact of the injury and resulting permanent disability on the worker's retirement options.

In my view the application of section 23.1 should be considered through the lens of section 23 as a whole and the overall purpose of the Act. The purpose of section 23 of the Act is to estimate **the impairment of earning capacity from the nature and degree of the injury** and provide compensation for 90% of the estimated loss of average net earnings resulting from **the impairment.** The impact of the injury and the resulting disability on earning capacity is at the heart of section 23 of the Act. It is difficult to see how the impact of the injury on the worker's retirement age is not a relevant consideration in determining the worker's date of retirement.

Further, this policy limitation disadvantages younger workers, who are less likely to have made clear retirement plans at the time of injury. A young, injured worker who has lost a limb for life, may well feel aggrieved when he or she receives the decision that the compensation for that injury will be terminated at age 65 while they must endure the impact of that impairment for life. Few young workers will have established verified evidence that they would have retired past age 65. Many will be living from pay check to pay check and may be entertaining dreams of retiring at age 55. For a young worker with a family and a mortgage, the chances of paying off the mortgage by age 65 may not be possible **as a direct result of the injury**.

29. **I therefore recommend that the Board of Directors consider amending policy # 41.00 to allow consideration of all relevant evidence regarding the actual impact of the injury on the worker's likely retirement date, including relevant evidence after the date of injury.**

One additional issue relating to retirement date merits comment. When the Board officer refers the issue to the Disability Awards Department, the evidence of the likely retirement date, particularly if the impact of the injury and resulting disablement is taken into account, is at best thin.

Because this issue is often of considerable important to the worker, who is facing a lifetime of disability, there is a tendency to almost automatically appeal these decisions and to make efforts to gather additional evidence. This is understandable in these circumstances. Failure to do so within 75 days means that decision is final and binding and not open to further review.

However, from a worker's perspective, the Board's decision on the retirement issue comes at a critical time when the worker is often involved in the vocational rehabilitation process and sometimes in the process of consideration of possible entitlement to a loss of earnings pension under section 23(3). The intrusion of an appeal at this stage when the worker is involved in vocational rehabilitation assistance does not assist the rehabilitation process. An appeal at this important time in the claim and in the worker's life can add to and often compound the frustrations that navigating the workers' compensation system can involve. It can have a significant non-therapeutic impact, especially when the appeal is opposed adding the further element of the adversarial process into the mix.

It would be more appropriate in my view to determine the likely retirement date as a preliminary determination under policy #96.21 at the time of the section 23(1) of the Act with a commitment to review that determination two years after all outstanding decisions relating to permanent disability entitlement are made. That will allow the worker an opportunity to provide all necessary information and sufficient evidence for the Board to make a final decision on this issue with confidence. The worker's long-term employment prospects and the impact of the injury on those prospects will be more available and more reliable at that point. This approach will require some added provision in policy #96.21 or a new related policy in #41.00 to provide the basis for a preliminary determination.

30. **I therefore recommend that the Board of Directors consider amending applicable policies to provide for a preliminary determination to be on the issue of the worker's likely retirement age under section 23.1 of the Act with a review of that determination two years after all outstanding decisions relating to permanent disability entitlement have been made.**

*Payment of Interest*

The issue of interest arose on a regular basis during the course of my consultations mainly from representatives from the worker community. They noted some delay in routine decisions, and frequent significant delays in implementing appellate decisions. One representative documented a 9-year delay in implementing a worker's pension entitlement for a chronic pain condition accepted under her claim and said, "She was denied interest on her delayed payment while the Board earned interest on her money in their investment portfolio." Another submission noted a worker who had to pay interest on borrowed funds to meet his financial obligations while the Board collected interest on his unpaid benefits.

The Workers' Advisers Office provided a detailed submission on this issue. They contend that under current policy, every time a benefit should be paid to a worker but is for one reason or another delayed for a significant period of time, the worker is essentially forced to make an unpaid loan to the Board. He or she may be forced into expensive borrowing while the Board has use of these funds. When the delayed benefit eventually is paid there is no adjustment for the effect of inflation, borrowing costs, or lost opportunity. They submit that payment of interest encourages prompt, complete and accurate decision-making.

The Act currently provides for the payment interest:

- Where survivor's benefits under section 19(2)(c) were incorrectly terminated; and
- Where payments resulting from Review Division decisions are deferred under section 258 pending an appeal to the WCAT.

Prior to November 1, 2001, policy #50.00 provided that the Board also paid interest to workers where:

- the wage-loss or pension was for a condition which was previously overlooked, or for which the Board had previously decided that no payment was due; and
- the effective date for payment of the restored benefits was more than one year prior to the date on which the retroactive benefits were processed.

The interest period was not capped, and interest was compounded and paid at a rate equal to the average return on the Board's investment portfolio for the preceding year, updated annually.

In 2001, the interest policy was changed to adopt the blatant Board error test that provided interest payments only where a Board officer made an "obvious and overriding" error. The issue of interest was considered by the courts in several cases without a clear resolution[19].

In 2012 the WCAT chair issued a decision under section 251 of the *Act* that the blatant Board error test was so patently unreasonable that it was not capable of being supported by the *Act*. The chair also found that the Board of Directors has the authority under section 82 of the Act to make policies for payment of interest in circumstances beyond those prescribed by the Act. The Board of Directors affirmed their policy as viable under the Act and directed the WCAT to apply the policy. Following further consultation[20] with the stakeholder communities, the Board of Directors removed any further provision to

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[19] for example *Johnson v. WCB* 2007 BCSC 1410 ; *Johnson v. British Columbia (Workers' Compensation Board)*, 2011 BCCA 255; *Lockyer-Kash v. WCB* 2016 BCSC 2435

[20] "Interest on Compensation" August 2012. A Board discussion paper for consultation with stakeholders.

pay interest on compensation claims other that the two provisions specified under the Act.

As pointed out by the Supreme Court of Canada in *Pasiechnyk,* [21] the four fundamental principles of the Workers Compensation Legislation are:

(a) compensation paid to injured workers without regard to fault;
(b) injured workers should enjoy security of payment;
(c) administration of the compensation schemes and adjudication of claims handled by an independent commission, and
(d) compensation to injured workers provided quickly without court proceedings.

*Policy considerations on the payment of interest*

(1) Security of payment and timely payment of compensation are foundational to the workers' compensation system.

(2) Payment of interest restores some of the "lost opportunity" from delayed payment.

(3) Payment of interest provides a "quality function" by providing a financial accountability for delayed payments.

(4) Payment of interest encourages correct decisions in the first instance rather than through appeals.

(5) The confidence in the workers' compensation system is eroded when the Board fails to meet its financial obligations in a timely manner.

(6) There is an onus on the worker to file a claim on a timely basis and to file a request for review or appeal within statutory time limits. There is no such statutory obligation on the Board to make timely decisions.

There are therefore some compelling reasons to consider the payment of interest when there has been a significant delay in the payment of due compensation.

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[21] *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)* [1997] 2 SCR 890

It addition to the foregoing reasons, there is an equity issue with respect to the payment of interest. Where entitlement to a payment is due but not paid, the board retains control of those funds and they are included in the Board's investment portfolio and the Board realizes a return on that investment at a higher rate than what the Board would pay on "simple interest"[22] which is the current method used where the Board now pays interest. When the Board pays no interest on delayed payments it receives a "benefit" in the form of the amount returned on investment for those funds.

The accident fund therefore retains those funds where the Board does not pay interest. Even where the Board does pay interest on delayed payments, the Board still gains the difference on amount earned through the Board's investment portfolio and the amount the Board pays in simple interest. An equitable approach to this issue in my view is for the Board to consider applying some of these accrued funds on investment to the payment of interest.

There are many policy options for the payment of interest on compensation and the payment of interest also involves administrative issues. The policy options are complex as illustrated by the wide variety of interest policies in the jurisdictions where interest is paid. It is beyond the scope of this time- limited review to craft a specific policy option for consideration by the Board of Directors. That requires administrative and actuarial considerations following carful investigation and analysis.

However, an equitable worker-centred approach to the payment of compensation merits consideration of an interest policy that is fair to workers and equitable to employers.

**31. I recommend that the Board of Directors initiate a review if the issue of interest with a view to establishing an equitable interest policy that recognizes the losses experienced by injured workers as a result of delays in the payment of due compensation where the delay is within the control of the Board or results from decisions that are overturned on review or appeal.**

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[22] Simple interest is calculated based only on the principal, while compound interest is calculated based on both the principal and previous interest accrued.

## *OCCUPATIONAL DISEASES*

*Evidence and decision making*

Policy #97.00 provides adjudicative direction and guidance for investigating claims and weighing evidence in the decision-making process. While this policy also applies to occupational diseases, its focus is primarily on investigation and adjudication of injury claims. Policy #26.23 provides adjudicative direction and guidance for investigating occupational disease claims. These claims are often more complex from an evidentiary perspective around exposure issues and the determination of a diagnosis.

Some recent court cases have offered judicial guidance for occupational diseases. For example, the Supreme Court of Canada in *British Columbia (WCAT) v. Fraser Health Authority* 2016 SCC 25 ("Fraser Health") found that the Board has a jurisdiction to decide causation by making inferences from the evidence, even though scientific proof is lacking.[23] This is consistent with the guidance in *Snell v. Farrell* [1990] 2 SCR 311.

The Supreme Court of B.C. in *McKnight v. Workers' Compensation Appeal Tribunal* 2012 BCSC 1820 found that "diagnosis" is a finding of fact and the adjudicator must apply a legal standard, not a medical standard, for a finding regarding a diagnosis. Under the Act, the legal standard is "as likely as not" under section 99(3), which may be different than a medical standard.

Policy #26.23 could be strengthened by incorporating these same principles.

**32. I recommend that the Board of Directors consider incorporating the principles regarding the onus of proof and medical evidence arising from recent judicial decisions into policy #26.23.**

*Date of Disablement*

Section 6 of the Act provides that compensation for an occupational disease is only payable if a worker is "disabled from earning full wages at the work at which the worker was employed".

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[23] The relevant quote from the judgement: *"The law in Canada requires a broad approach to the evidence, which, together with a pragmatic, common sense consideration of the evidence, enables inferences of causation to be drawn even though scientific proof is lacking."*

Policy #26.30 "Disabled from Earning Full Wages at Work" lists some examples of what constitutes disabled from earning full wages at work, including missing part of a shift or not working full hours. Currently, the policy lists "the need to change **jobs** due to the disabled effects of the employment". Equating the provision in the Act - disabled from earning full wages at the work at which the worker was employed" with "disabled from earning full wages at work" has resulted in some ambiguity in adjudicating this issue.

In one case, a pulp mill worker had a sulfur dioxide exposure at work and developed permanent reactive airways disorder. The employer accommodated him so other than attending the emergency room and some medical appointments, he never missed work due to his disability. The Board found that although his injury was compensable, there was no referral to Disability Awards for his significant permanent impairment because he was not disabled from earning full wages, under policy #26.30.

The Board interprets section 6 to indicate that where a worker accepts light duties or modified pre-injury duties they are not disabled from earning full wages at work. Yet the worker is disabled "from the work at which he was employed", otherwise modified duties would not be required.

This ambiguity can be resolved by simply indicating in policy #26.30 the need to change **job duties** at the work at which the worker was employed is sufficient to comply with section 6(1) for compensation purposes. This would ensure that workers who take alternate duties to avoid missing time at work will not be penalized.

**33. I recommend that the Board of Directors consider amending policy #26.30 to recognize that the worker is disabled for purposes of paying compensation where the occupational disease disables the worker from performing his or her regular job "duties."**

A related problem arises on time limits for making an application in policy #32.55 "Time Limits and Delays in Applying for Compensation." That policy now indicates that the one-year deadline for filing an occupational disease claim starts running from the date of disablement. WCAT cases have confirmed that the "date of disablement" must be treated as the date of the occurrence of the injury for section 55 purposes (*WCAT #2005-03633* - Noteworthy Decision re Red Cedar Dust Asthma). There is no "date of disablement" for s. 55 purposes if the worker has not taken time off work (*WCAT-#2014-01931* Noteworthy Decision).

This can be resolved by recognizing in policy #32.55 the same principle for time limits for injuries under section 5 of the Act in policy #93.22. That policy recognizes special circumstances in a situation where a worker with a minor physical injury was not disabled from work and did not require medical treatment. The Board of Directors may also wish to consider a minor policy amendment in policy #32.55 to address that issue.

*Activity Related Soft Tissue Disorder (ASTD) claims*

I received many submissions regarding ASTD claims. The Board receives a high volume of these claims. They often make their way into the appeal process. Policy #27.00 - #27.32 provides detailed adjudicative direction and guidance for these claims for specific conditions. The first step in the adjudication process is to determine whether the claim is to be adjudicated under section 5 of the act as a personal injury or under section 6 as an occupational disease. Diagnosed conditions recognized through regulation or listed in schedule B are normally adjudicated under section 6 unless the condition arises from a specific incident or trauma, a series of trauma or the onset occurs during a specific shift.

Policy #27.00 2. addresses in general terms the distinction between an ASTD claim that is considered an occupational disease and one that is considered a personal injury. Often the diagnosis of an ASTD condition is unclear at the outset of the claim and it is difficult to determine which section of the Act should be used for adjudication. In the past, the ASTD *Practice Directive* provided guidance on what section of the Act (section 5 or section 6) to apply for different conditions and circumstances and stated that where there was a "working diagnosis only", an ASTD should be adjudicated under both section 5 and section 6. The current *Practice Directive* does not contain this provision nor does the ASTD policy.

This means that simple diagnostic issues - unclear or conflicting or delayed or multiple diagnoses, which are not uncommon for ASTDs - can lead to ASTD claims being adjudicated under the wrong section, under the wrong policy and having the wrong causation tests applied at the Board and on appeal. If the worker must seek additional decisions under the other section of the Act, there will be a significant delay in compensation benefits and a fragmentation of the Board's adjudication, often causing problems of jurisdiction on appeal. A clear statement in policy #27.00 to indicate that, where there is some evidence that the ASTD could be considered under either section 5 or section 6,

both issues be adjudicated at the same time to avoid unnecessary appeals and resulting delays.

**34. I recommend that the Board of Directors consider an amendment to policy #27.00 2. to indicate that, where there is no clear diagnosis and there is some evidence that the ASTD could be considered under either section 5 of section 6, the decision include consideration of the claim under both sections.**

ASTD adjudication policies provide specific direction regarding risk assessment for these conditions. *Practice Directive* C4-2 which is not Board policy, is relied on extensively to adjudicate ASTD claims. Labour representatives contend that the guidelines in *Practice Directive* C4-2 are outdated and rely primarily on research that is over 20 years old. They argue that, "The numbers are mostly derived from individual studies cited in the NIOSH 1997 Systematic Literature Review *Musculoskeletal Disorders and Workplace Factors - A Critical Review of Epidemiologic Evidence for Work-Related Musculoskeletal Disorders of the Neck, Upper Extremity, and Low Back.* "

I was referred to *WCAT-2011-02371* that provides a detailed analysis that documents the limitations of P*ractice Directive* C4-2 in adjudicating ASTD claims. That directive contains "pre-conditions" that preclude the exercise of discretionary decision-making as set out by policy. Many of the numeric values establish standards which are equal to or higher than the risk factor thresholds set out in Schedule B. The Vice-Chair noted that the "one-size-fits all" prescriptive approach set out in Appendix 1 of the *Practice Directive* essentially defeats the purpose of the legislation and binding policy, which both provide for flexibility to consider the particular circumstances of the case and the exercise of judgement consistent with section 99 of the Act.

The impact of lack of discretion exercised by decision-makers can be seen in the judicial review of *WCAT-2013-03319* in *Rutter v. WCAT 2015 BCSC 862.* In this case the court found that WCAT had narrowed the work-related risk assessment to one of "repetition" and imposed a higher standard of causation for this single factor than provided for by policy. More importantly, the court found that WCAT was patently unreasonable when it virtually ignored the worker's right shoulder disability as a "risk factor" for developing a left shoulder ASTD. The court stated that although favouring one's shoulder is not expressly identified as a risk factor in Board policy, it was required by the general language of policy #27.00 and section 250(2) of the Act and was "clearly called out for" in the circumstances of the case.

In light of the high number of appeals arising out of the application of *Practice Directive* C4-2 and the court's judgement on the importance of affirming consideration of all of the relevant circumstances:

**35. I recommend that the Board of Directors consider an amendment to policy #27.00 further emphasizing the importance of identifying all of the relevant risk factors that exist in the particular case and base the decision on a careful evaluation of the evidence in accordance with Board policy and taking into consideration the merits and justice of the individual case.**

Worker representatives also submit that the Board's *Occupational Health and Safety Regulation* (Regulation) and published guidelines provide more up-to-date guidance addressing risk factors for preventing musculoskeletal injuries and these factors should be incorporated into the *Practice Directive* to guide adjudication of these conditions. Sections 4.46-4.53 of the Regulation address "Ergonomic (MSI) Requirements" where "MSI" means a "*musculoskeletal injury*" or injury or disorder of the muscles, tendons, ligaments, joints, nerves, blood vessels or related soft tissue including a sprain, strain and inflammation that may be caused or aggravated by work.

The guidelines for this section of the Regulation set out how to assess risks using MSI Risk Factor Identification Worksheet A and MSI Risk Factor Identification Worksheet B. This data may be relevant to the adjudication of claims in some cases.

**36. To ensure that relevant risk factors in the workplace are fully considered in the adjudication of ASTD claims, I recommend that the Board of Directors consider an amendment to policy #27.00 5. that the use of relevant risk analysis data from the workplace be considered in the adjudication of these claims.**

With the changing nature of work and the integration of computers in the workplace, many of the issues arise from ASTD claims from workers with intense typing, keyboarding and mousing tasks. These claims are often denied on the basis that the single risk factor of repetition cannot result in an ASTD type injury. Yet this is not consistent with the Board's approach to ergonomic issues for computer use, under the Regulation and guidelines.

**37. I recommend that the Board of Directors consider developing an ASTD policy specific to the risk factors consistent with the ergonomic requirements in the Regulation and guidelines.**

One union that represents diagnostic imaging workers advise they have assisted 29 members appeal ASTD decisions based on the C4-2 guidelines. They point out that of the 29 members, appeals were allowed in 26 of the cases with additional evidence from a professionally-trained ergonomist. They argue that many of the ASTD appeals now clogging the appeal system could be avoided if the Board carried out standardized ergonomic assessments using more up-to-date environmental risk factors. It is apparent from the evidence presented that professional ergonomic assessment is the best available evidence to resolve the ASTD issue. It would be more effective from a worker-centred approach for the Board to apply this ergonomic expertise at the first level of decision-making to get it right without the negative impact involved in forcing the worker into the appeal system.

**38. I recommend that the Board of Directors consider what steps are necessary to ensure that there is adequate expertise at the Board level to fairly and efficiently adjudicate ASTD claims without resorting to review and appeal levels wherever possible.**

The union also argued that their record of successful appeals supports consideration of an industry presumption under schedule B for diagnostic medical imaging technologists. I make no recommendation on this, since it is beyond the scope of my terms of reference. Prior to 2002, the Board had an Occupational Disease Standing Committee with a mandate to review the Board's occupational disease policies and make recommendations for changes and additions to the Board. That Committee provided the Board with a mechanism to determine whether there was a basis to recognize a probable relationship between a disease and an occupational activity and make recommendations about additions to Schedule B.

## MENTAL DISORDERS

Policy C3-13.00 sets out decision-making principles for determining a worker's entitlement to compensation for a mental stress injury, under section 5.1 of the Act. In consultations, it became clear that the majority of mental disorder claims arose from occupations that involve work related traumatic events and stressors, such as first responders. It also appears to be the case that the majority of these claims are not accepted.

There is no doubt that section 5.1 imposes special restrictions on mental disorder claims, compared to other types of injuries. However, in a worker-centred compensation system, Board policy should not raise the bar to compensation higher than the legislation provides. In my view, policy C3-13.00 creates further barriers to compensation for work-related injuries in this area in two main ways.

First, the policy guides a decision-maker to seek a definition of "traumatic events" and "significant stressors" using workplace norms as an objective standard. The policy defines "traumatic events" as being an emotionally shocking event "which is generally unusual and distinct from the duties and interpersonal relations of a worker's employment" and a significant "work-related stressor" as one which is excessive compared to the "normal pressures or tensions". This policy guidance strongly indicates that traumatic events or stressors which are NOT unusual do not qualify under this provision, excluding the very type of event which is likely to be involved in a mental stress injury for these occupations.

In effect, these policy provisions import an element of an old "assumption of risk" doctrine in that the "normal" or "usual" job duties are objectively non-compensable (the worker assumes the risk) and only "unusual" events are compensable. Normal work is effectively exempted from compensation for mental stress. This barrier is not required or sanctioned by the legislation. At the same time, it is clear that the legislation did not want to endorse a "causative significance" test for these type of injuries.

It would be helpful if policy permitted both a subjective and objective element to the definition of "traumatic event" and "significant stressors", by removing the provisions requiring that the events or stressors be "unusual" or outside the "normal" and instead, offering another standard. A "traumatic" event could be one which in all the circumstances was reasonably likely to have traumatized the worker.

**39. I recommend that the Board of Directors consider amending the definitions of "traumatic event" and "significant work-related stressor" to remove the requirement that events or stressors be "unusual" and to include a subjective element to the definitions.**

Secondly, the policy offers little guidance, other than what is in section 5.1(1)(c) the Act, for situations which will be excluded from consideration, what is known as the "labour relations exclusion".

It would be helpful if the policy clarified that this provision only excludes mental disorders that are a direct reaction to the employer decision itself. Everything a worker does in a workplace is ultimately decided at some level by the employer and if read too broadly, this policy could exclude some claims not intended by the legislation. The provision of examples would be particularly helpful. For example, if a worker hears that several co-workers are being laid off, his or her reaction to the employer's decision is not compensable, however traumatic, due to this provision. However, if a worker is forced to work long hours in stressful conditions due to her employer's downsizing, a resulting mental disorder that is due to the impact of these negative working conditions should not be excluded from consideration on the basis of the "labour relations exclusion" without consideration of all the relevant facts.

**40. I recommend that the Board of Directors consider amending policy C3-13.00 clarify that application of section 5.1(1)(c) of the Act, the "labour relations exclusion" is to be applied to reactions to the employers' actual decisions, not workplace conditions as a whole.**

The final issue to consider is the sensitivity and compassion that these claims require. Appendix 3 contains a brief case summary where the worker's interaction with the Board was problematic and from the worker's perspective clouded with suspicion. The nature of these conditions requires special sensitivity to not worsen the condition. The Board's Department of Special Care Services provides support for psychologically fragile workers when those cases are referred to them, but this is not always the case before cases are referred to them.

This is particularly problematic where there is some doubt on the Board's part about the validity of the claim. I heard several concerns expressed regarding the use of video surveillance to investigate some cases involving psychologically fragile workers.

*Video Surveillance*

Currently, there is no policy governing the Board's use of video surveillance to gather evidence on injured workers. The *Practice Directive* #C 12- 7 provides some guidance but is not binding.

This is a difficult subject. Ideally, video surveillance should be the "tool of last resort", used only when there are "reasonable grounds" to suspect misrepresentation or fraud on the part of the worker and safeguards for using this tool should be carefully adhered to, especially for psychologically fragile workers. This was not the information I received in my consultations.

I believe that video surveillance is an area where there needs to be substantial changes in Board practice, informed by clear Board policy. In effect, video surveillance should be a tool used to determine if a worker has engaged in serious misconduct. It should be used with clear procedural guidelines and protections and should not be used as a simple adjudicative tool for difficult files. There is also a disturbing pattern of claims which are denied or terminated on the basis of video surveillance, but which, on appeal, are found to not be substantiated by the video surveillance.

Important principles for a new policy on video surveillance could include:

- A request procedure which requires:
  - clear and substantive reasoning and is not just a subjective opinion from a claim owner; and
  - Approval by a person independent of the claims adjudication process, based on clear criteria. This is the path used for Prevention investigations.

- Guidelines that video surveillance is a tool of last resort. Where there is a concern about the consistency of a worker's presentation, claim owners should attempt to attain additional assessments or evidence prior to a request for surveillance.

- A requirement that when the video surveillance is obtained, it is examined for its probative value by a qualified examiner. *WCAT-2003-03300* provides helpful key questions for the assessment of video surveillance.

- That if there is a consideration of adverse decisions after the surveillance is completed and examined, that the worker or his representative will be provided with the surveillance evidence and given a reasonable time to respond.

- If criminal charges are contemplated, then the procedural protections afforded by the Charter in a criminal context apply. In the context of an investigation, these are set out in *R. V. Jarvis* [2002] 3 S.C.R.

41. **I recommend that the Board of Directors consider implementing a policy for the appropriate use of video surveillance to meet Board responsibilities without causing unintended harm to the worker.**

## CONCLUSION

At the heart of workers' compensation in British Columbia is the need to share a joined commitment on the part of workers and employers to maintain a fair and equitable workers' compensation system. The sustainability of the system depends on maintaining a balance of interests between these primary stakeholders consistent with the principles of the historic compromise. Failure to maintain this balance can undermine the integrity of the system and invite its demise.

As Mr. Justice Tysoe pointed out in his 1966 Royal Commission Report, the overriding purpose of the system is to protect workers from injury and disease by maintaining safe and healthy workplaces. Where workplace injury and/or disease occurs, the system must support the worker's maximum recovery and restore the worker to safe and productive employment at no loss of earnings wherever possible and equitable compensation where that goal is not achieved.

Employers carry the responsibility of maintaining sufficient funding of the system to ensure that injured and disabled workers receive the necessary supports to achieve maximum recovery, return to safe, productive and durable employment, and adequate compensation benefits to replace the financial losses they suffer as a result of the injury.

Workers bear the heavier burden of dealing with the pain and suffering resulting from the injury, the disruption to their lives and livelihood, and the financial stresses that often accentuate the resulting disablement. To be equitable, the funding from employers must be sufficient to provide the necessary supports and services to fully restore injured workers to their pre-injury employment status and provide compensation benefits needed to replace their losses.

The 2002 changes to the Act were based on a fear largely on the part of employers and the new government that the existing benefit levels were unsustainable based on a predicted unfunded liability. That projected unfunded liability was based on assumptions rooted in the experience from the economic downturn in 2000-2002 and never materialized. As previously noted the Board ended up with a surplus of $571 million in 2002.[24]

Since, 2002, employers have received a 15% reduction in average assessment rates while workers benefits have been frozen at the reduced levels introduced in 2002. In 2015 the Board reported a surplus of $927 million and in 2016 a surplus of $471 Million.

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[24] H. Allan Hunt, Service Delivery Core Review: A Reappraisal, 2010, Page 14.

This has resulted in a significant imbalance between the adequacy of benefits to workers and the sufficiency of the accident fund for employers. Restoring that balance in benefit levels is mainly a legislative issue and is beyond the scope of this policy review.

My task in this review has been to identify policy options for consideration by the Board of Directors to restore a worker-centred approach.

The first step in restoring this balance in policy is to incorporate the requirement in section 99 of the Act to consider the merits and justice of the individual case when applying a policy of the Board of Directors. This requires adequate investigation of the facts and circumstances of the case with particular attention to the worker's evidence before making a decision. This emphasis must not only be incorporated into the words of policy, it must become an essential part of the Board's case management system. Treating workers with dignity and respect is an integral part of a worker-centred approach and must be a hallmark of the Board's interaction with workers.

The focus of my recommendations in this review is on restoring injured workers to safe, productive and durable employment as soon as the medical evidence indicates that is appropriate in the circumstances of the case. I have also provided policy options that reinforce the key goal of returning injured worker to the injury employer wherever possible. This is not only an emerging legal imperative, it also makes good sense for both the worker who maintains an established attachment to the pre-injury workplace, and of value to the employer who retains a trained and experienced worker.

Perhaps most important, retaining the injured worker with the injury employer minimizes the need to engage in complex and sometimes expensive retraining and re-employment supports to place the injured worker with a new employer. The cost associated with increased vocational rehabilitation benefits in the early stages of the claim to confirm attachment with the injury employer, result in significant savings in the later stages of the claim where placement with a different employer is costly and sometimes results in loss or earnings consideration.

The challenge for a renewed vocational rehabilitation commitment in the early stages of the claim is first the need for additional vocational service delivery capacity and second, and equally important, that the additional staff have the necessary training and experience in disability management to delivery this support efficiently and effectively using established disability management tools and strategies. Ontario has pursued this strategy for six years with considerable success in both restoring workers to productive em-

ployment with their injury employer, but also achieving significant cost savings. They attribute their success in part to their commitment to require and support certified professionalized training for the return-to-work specialists who carry out this work.

A secondary area of focus in my recommendations is to identify policy options to prevent unnecessary appeals. There is a high level of appeal activity around light duty reemployment and around pension and loss of earnings issues. I have recommended policy options to provide a greater worker-centred approach in these areas, with the intent of reducing unnecessary appeals that often delay and sometimes disrupt the return to work efforts. The Board's new "Comprehensive Framework for Quality Decision Making Sec 23(3)" is an example of a proactive approach now being taken by the Board.

I have attempted to address key areas of concern raised by employer and worker stakeholders. However, there are many additional areas that merit attention that I was unable to investigate and fully consider within the nine-week time frame of this review. It is my hope that where there are other issues in which stakeholder representatives and the Board's administration feel that significant improvements can be made, or where my recommendations can be improved, I urge them to bring these to the attention of the director of the Board's Policy Regulation and Research Division for consideration and where appropriate to the Board of Directors.

Based on my experience with this review, I believe the employer and worker stakeholder communities appreciate the need to correct the imbalance that has occurred in the system over the last 15 years and to restore that balance with a worker-centred approach to ensure that the British Columbia workers' compensation system is sustainable over the long term.

## ACKNOWLEDGEMENTS

In the course of this review I have had the privilege of meeting with and hearing the ideas, concerns, and recommendations of representatives of the employer and worker communities. On the basis of my consultations I believe there is a willingness to work together to improve the system where it is found lacking. I am greatly indebted to each and every representative that took the time to share their views and their vision of a fair and equitable system.

Alan Winter and Janet Patterson provided some sage advice and guidance as I navigated challenging legal issues. Janet was especially instrumental in providing me with a grounding in the many judicial decisions that provide guidance for the system. I especially appreciate the insights and ideas that Doug Alley from the Employer's Forum and Nina Hansen from the BC Federation of Labour shared. They very ably represented the views of their respective communities.

I also want to express my appreciation to the leadership of the Board's administration who were generous with their time to review some of my proposals and offer valuable advice. I am especially grateful to Trevor Alexander, Senior Vice President of Worker and Employer Services and his leadership team whose guidance was invaluable to me. I believe they have the expertise and commitment to make support the transition to a more worker-centred approach. Lori Guiton, Director of the Board's Policy, Regulation and Research Division was especially helpful in providing background information and analysis.

I was very impressed with the commitment of the Workers Advisers Office and the Employers Advisors Office not only to serve their constituent communities, but to also work toward solutions that benefit the workers compensation system as a whole. I believe they can and will play an important role in promoting and supporting a worker-centred approach that is equitable to workers and employers.

I had an opportunity to meet with each of the members of the Board of Directors and I am impressed with the calibre of the leadership they convey. I am particularly indebted to Lynn Bueckert, the director representative of workers, and Lillian White, the director representative of employers, who serve as co-chairs of the Board of Directors Policy Committee. Together they met with me at critical junctures in this review. While they ably represent their constituent communities, they together demonstrate the commitment to cooperation needed to achieve a balanced system that serves the employers

and workers of British Columbia. I also thank Board chair Ralph McGinn for giving me the opportunity and the privilege of participating in this important project.

Finally, I must thank my good friend and colleague Donna Hanson for her invaluable assistance, patience and support for making it possible for me to compile and deliver this report on time.

# Appendix A

| Name | Title | Organization |
|---|---|---|
| Alexander, Trevor | Senior Vice-President, Operations | WorkSafeBC |
| Alley, Doug | Managing Director | Employers' Forum |
| Bains, Hon. Harry | Minister of Labour | Ministry of Labour |
| Blakely, John | Executive Director | Ministry of Labour, Labour Policy and Legislation Division |
| Boddez, Angela | Director, Fair Practices Office and Registrar | WorkSafeBC |
| Buck, Brad | Manager, Safety Advisory Services | BC Public Service Agency |
| Bueckert, Lynn | Board of Director | WorkSafeBC |
| Chauhan, Sam | Manager, Occupational Health & Safety | City of Surrey |
| Corwin, Lucas | Director | Ministry of Labour, Workers' Advisers Office |
| Cooke, Alan | Board of Director | WorkSafeBC |
| Dehek, Lani | Manager of OH Disability Management | BCNU |
| Dhillon, Baltej | Board of Director | WorkSafeBC |
| DoCouto, Evie | Vice President, Return to Work Division | Workplace Safety & Insurance Board |
| Earle, David | President & CEO | BC Trucking Association |
| Farquhar, Alec | Director | WAO, Ontario MOL |
| Fournier, Kim | Manager, Law and Policy | Ministry of Labour, Employers' Advisers Office |
| Gravelle, Joyce | Vice-President, Administration | National Institute for Disability Management and Research |
| Guiton, Lori | Director, Policy, Regulation & Research | WorkSafeBC |
| Hanna, Janice | Claims Adjudicator, WCB Disability Awards | Retired |
| Hansen, Nina | Director, Occupational Health and Safety | BC Federation of Labour |
| Haralds, Dave | Executive Director | Ministry of Labour, Employers' Advisers Office |
| Harder, Brian | OH&S Representative | United Steelworkers |
| Harrison, Rolf | Lawyer | Harrison O'Leary Lawyers |
| Hartmann, Chris | Director, Return to Work Services, Voc Rehab & Disability Awards | WorkSafeBC |
| Hughes, Trevor | Deputy Minister | Ministry of Labour |
| Hunt, Stephen | District Director | United Steelworkers District 3 Western Provinces and Territories |
| Hynes, Susan | Chief Review Officer | WorkSafeBC |
| Ishkanian, Vahan | Barrister and Solicitor | |
| Jackson, Alex | Rehabilitation Consultant | |
| Jobe, Jim | WCB Advocate | Health Sciences Association |
| Kawa, Leah | EDMP Administrator, Labour Relations Officer | Health Sciences Association |
| Kilby, Jeannie | President | CUPE 402 |
| Laurie, Michelle | Staff Representative | United Steelworkers |
| Leyen, Jennifer | Director, Special Care Services | WorkSafeBC |
| Loftus, Lee | Board of Director | WorkSafeBC |

| Name | Title | Organization |
|---|---|---|
| Love, Kevin | Barrister and Solicitor | Community Legal Assistance Society |
| Lowes, Larry | Manager, Health and Safety | London Drugs Limited |
| Luck, Susannah | WCB Case Manager | Morneau Shepell |
| MacDonald, Iain | Staff Representative | BCGEU |
| MacDonald, Pamela | Regional Manager | Workers' Advisers Office |
| McDonald, Todd | Vice-President, Claims Services | WorkSafeBC |
| McGinn, Ralph | Chair, Board of Directors | WorkSafeBC |
| McKenna, Tom | National Representative | CUPE |
| McMillan, Grant | Strategic Adviser | Council of Construction Associations |
| McNeil, Margaret | Board of Director | WorkSafeBC |
| Miles, Diana | President & CEO | WorkSafeBC |
| Morrison, David | Regional Manager | Workers' Advisers Office |
| Nicholls, Rob | Manager, Safety, Security and Emergency Management | Metro Vancouver |
| O'Donnell, Merrill | Workers Advocate | BC Building Trades |
| O'Leary, Sarah | Lawyer | Harrison O'Leary Lawyers |
| Parhar (MD), Dr. Gurdeep | Executive Association Dean | Clinical Partnerships Faculty of Medicine, UBC |
| Parker, Jim | WCB Officer | BCNU |
| Patterson, Brooks | Board of Director | WorkSafeBC |
| Patterson, Janet | Barrister and Solicitor | |
| Pendray, Andrew | Chair | Workers Compensation Appeal Tribunal |
| Picotte, Adam | Barrister & Solicitor - WCB Advocate | Health Sciences Association |
| Pongracic-Speier, Monique | Lawyer | Ethos Law |
| Rogers, David | Rehabilitation Consultant | |
| Rothfels, Dr. Peter | Director, Clinical Services and Chief Medical Officer | WorkSafeBC |
| Schmidt (PhD), Dr. James | Neuropsychologist | Schmidt Trentadue & Associates |
| Schnoff, Niki | Staff Representative | Move Up Together |
| Shaw, Ian | Senior Vice- President & General Counsel | WorkSafeBC |
| Startup, Mark | President | Retail Council of Canada |
| Stoffman, Larry | Consultant | United Food and Commercial Workers Union (UFCW) Local 1518 |
| Tanner, Michael | Director | Ministry of Labour, Labour Policy and Legislation Division |
| Taylor, Alex | Regional Manager | Workers' Advisers Office |
| Teschke, Kay | Board of Director | WorkSafeBC |
| Wainwright, Helga | LRO | Health Sciences Association |
| White, Lillian | Board of Director | WorkSafeBC |
| Williams, Blake | Past Director | Workers' Advisers Office |
| Wilson, Greg | Director, Government Relations | Retail Council of Canada |
| Winter, Alan | Barrister and Solicitor | Harris and Company |
| Wolfgang Zimmerman | President & CEO | Pacific Coast University for Workplace Health Sciences |
| Young, David A. | Regional Director, Worker and Employer Services Division | WorkSafeBC |

# Appendix B

Table 1 Lost time, Duration and Impairment data (source AWCBC KSM 2016)

| | total lost time claims | lost time Injury frequenty | Average composite duration of claims | Average impairment rating | % of claims awarded impairment benefits |
|---|---|---|---|---|---|
| British Columbia | 51,044 | 2.2 | 70.90 | 9.6 | 11.1% |
| Alberta | 24,380 | 1.25 | 65.75 | | 11.22% |
| Saskatchewan | 8,589 | 2.11 | N/A | 7.43 | 6.75% |
| Manitoba | 14272 | 2.89 | 77.40 | 4.86 | 6.82% |
| Ontario | 57,386 | | N/A | 9.92 | 5.97% |
| Quebec | 68,537 | 1.8 | N/A | 10.27 | 26.66% |
| New Brunswick | 4,516 | 1.33 | 92.3 | 7.1 | 14.92% |
| Nova Scotia | 6,087 | 1.93 | 110.32 | 7.93 | 23.94% |
| Prince Edward Island | 1,010 | 1.47 | 74.3 | 6.28 | 20.52% |
| Newfoundland and Labrador | 3,589 | 1.72 | 117.07 | 15.18 | 14.09% |
| Yukon | 464 | 2.1 | 30.76 | 8.56 | 8.09% |
| Northwest Territories and Nunavut | 826 | 2.03 | 49.94 | 9.4 | 13.5% |

| Table 1.2 Compensation Benefits by Province (source AWCBC) | | | | | |
|---|---|---|---|---|---|
| | **Maximum comp earnings** | **% of earnings benefits are based on** | **Waiting Period** | **Permanent Disability maximum: PTD** | **Permanent disability minimum: PTD** |
| **British Columbia** | $78,600.00 | 90% of net | no | $4,486.22 | $1,691.85 |
| **Alberta** | $95,300.00 | 90% of net | no | $5,152.42 | $1,428.70 |
| **Saskatchewan** | $65,130.00 | 90% of net | no | $4,884.75 | $2,124.74 |
| **Manitoba** | No Maximum | 90% of net | no | $5,901.85 | $1738.70 |
| **Ontario** | $85,200.00 | 85% of net | No | N/A | N/A |
| **Quebec** | $70,000.00 | 90% of net | no | N/A | N/A |
| **New Brunswick** | $60,900.00 | 85% loss of earnings | 3/5 of weekly benefits | $3,285.66 | no minimum |
| **Nova Scotia** | $56,800.00 | 75% 1st 26 weeks then 85% of net | 2/5 weekly benefits | N/A | no minimum |
| **Prince Edward Island** | $52,100.00 | 85% of net | 2/5 weekly benefits | lump sum | no minimum |
| **Newfoundland and Labrador** | $61,615.00 | 80% of net | 2/5 weekly benefits | $3,121.32 based on 80% net earnings | some minimum rules apply |
| **Yukon** | | | | | |
| **Northwest Territories and Nunavut** | $86,000.00 | 90% of net | no | $1138.25 northern residents | no minimum |

| Return-to-Work/Duty to Accommodate | | | | | |
|---|---|---|---|---|---|
| | **Obligation to Re-Employ** | **Legislation** | **Policy & Procedure** | **DTA Details** | **RTW Details** |
| British Columbia | No | N/A | N/A | Employers encouraged to rehire at Phase II | No requirement under WCA for employers to rehire injured workers |
| Alberta | Yes | S.88.1(1) & (3) | Draft 04-05 Appl. 2-5 | Wkr empl 12 months<br>No exemption for small empl. | DTA unless undue hardship |
| Saskatchewan | Yes | S.51, 5.3 & 101 (1b)(ii) | POL 08/96<br>POL 01/07 | To the point of undue hardship | Obligation of employer to cooperate |
| Manitoba | Yes | S.49 (3) | Policy 43.20.25 | Applies where 25+ workers 12 continuous months | Reinstatement in original job where possible |
| Ontario | Yes | S.41 – 43<br>Reg 35/08 | 19-02-02<br>Respons. of wkr/empl. | To the point of undue hardship<br>Exception for construction | Obligation to reemploy 20+ |
| Quebec | Yes | S.32<br>S 234 – 251<br>S. 176 | Policy 3.01<br>3.02 | Commission may reimburse cost of accommodation | Right to reinstatement within 1 year where 20+ workers |
| New Brunswick | Yes | S.42.1 | Policy 21 - 413 | Required to re-employ > 10 exempt<br>10-19 1 year<br>20 + 2 years | Duty to communicate DTA from human rights – obligation 1 year |
| Nova Scotia | Yes | S.89 – 101 | Policy on re-employment | Empl with less than 20 exempt<br>1 year empl | To the point of undue hardship |
| Prince Edward Island | Yes | S.86.1 – 86.12 | Policy 93 RTW | 20+ workers<br>1 year<br>Const. exempt | To the point of undue hardship |
| Newfoundland/ Labrador | Yes | S.89 – 89.4 | Policy 33.00 – 43.00 | 20 + workers<br>1 year empl. | To the point of undue hardship |
| Yukon | Yes | S.41 (1) | Policies 04-06<br>07-1-3<br>08 | 20 + workers<br>Empl 1 yr | Mandatory accommodation |
| Northwest Territories & Nunavut | No | S.46 | Policy 04.14 | No DTA | VR Services |

# Appendix C

Firefighter case study - PTSD

(the following case study was provided by a firefighter who agreed to include this in my report)

About 4 years ago, in December sometime in the morning, I went to a call for a sick child. When we arrived, we quickly realized that this child ( I believe he was under 18 months) was way sicker than we thought. He wasn't breathing and had no pulse. The scene quickly escalated. The family panicked, and screaming everywhere, I personally picked up the infant and began our cpr protocols in my arms. (the child was on a bed, so we had to transfer to a flat surface). The ambulance arrived shortly after us, and began the airway control and had us continue the cpr. Anyways...long story short, I did CPR on this child all the way to the hospital, with the majority of it occurring in my arms. It was awful. The child didn't make it.

This call happened on our first day shift. I didn't feel like coming to work the next day and called in sick. I called in sick for my night shifts too. (3 sick days) Those 3 days off, I hung out with my friends and family, sought professional help, had a beer or two, and went into the mountains to snowboard and clear my head. It was the perfect rehab for me. When I returned to work, I felt great about things.

Approximately 2-3 months later, [my captain who is responsible for Health and safety] approached me and asked whether I took those days off sick because of that call, and I replied yes. He wanted me to make a claim with WCB. I agreed. I was going to try and claim back my 3 days of sick time.

I'm not sure how it all got started, but I received a call from a WCB case agent. This was an intake person before I was assigned my actual person....This person knew the story from what I had claimed, but phoned to get some information from me, start my claim, inform me of the process, and to ask about the incident. I recounted the incident to her and re-lived all the emotions that came with it. It was awkward to pass this story on to an intake person, but assumed that she'd understand. She took my story, and said she would pass on my claim to a case manager and that I would receive a call within a certain time period..(can't remember how long it was)

Fast forward a couple weeks. [My case manager] gave me a call to introduce himself, explain the process and hear the story. I recounted the story to him, relived the emotions, and now was frustrated that I had to repeat this story again. [He] agreed that "it must have been stressful" and that it certainly warrants a WCB claim. [He] went on to say how as firefighters were expected to "weather a certain amount of expectational stress" (as in, this kind of stress is considered expected for our job, whereas it wouldn't be for other jobs). I had no idea what

else to say to him. I asked a few questions, and then left it at that. He was going to start my claim process and get back to me.

A week or so later [he] calls back. He asked how I was doing, and explained what was going to happen next. But first, he wanted me to talk about the incident again. I wasn't too thrilled on telling the story again, so I left out some of the major details and told him the basics, as he already knew the whole story...right? After the basics were done, [he] wanted to know more about the stuff I left out this time, so he probed, and asked for some more of the details, and basically made me tell him all the story again. I felt at this point that they did not believe me, and that the reason I was telling the story over and over and over was to see if it was the same each time – like they were trying to find a gap in the story or something like that. It stressed me out.

IN order for me to have my claim accepted, I would have to go see one of their doctors for an evaluation. Fine I thought...whatever. ...but then he said "in order for your claim to be accepted, our doctors will have to diagnose you with an accepted mental disorder....like one in the big book of medicine...on the list of mental disorders..." Once I was diagnosed, then my medical records would be passed on to my employer and my claim would be accepted. I didn't like the sound of that. I was really stressed now. I told him that I would call him back, but that I didn't like the sound of that.

I called [my captain] to discuss what he wanted me to do. I had now been dealing with this call for way too long, re-lived it way too many times, and told [my captain] I was more stressed now then I was after the call. I wanted to drop the claim and he agreed.

I called [the case manager] back and told him I was going to drop the case. I told him what I thought about the process and left it at that. I was done.

It was an awful experience mostly because I felt like they didn't believe me at all. It honestly felt like such an uphill battle against someone who has NO IDEA what it is like to do my job...let alone CPR on a child, in front of the family, at Christmas.

# Balance. Stability. Improvement.

## *Options for the Accident Fund*

Note: ***This document contains policy advice intended for WorkSafeBC's Chair and Board of Directors. It is not intended for release or circulation.***

Final Report
December 6, 2018

**Terrance J. Bogyo**
Independent Researcher | Speaker | Consultant

## Preamble

In mid October 2018, I was asked by the Chair of WorkSafeBC, Ralph McGinn to undertake a review of options related to the Accident Fund. Specifically, the brief required me to:

...conduct a review of options under the *Workers Compensation Act* (the "Act") for WorkSafeBC and its Accident Fund that support WorkSafeBC's mandate. The review must meet the following requirements:

> (a) The options provided must recognize and be consistent with WorkSafeBC's mandate as set out in the Act to manage the Accident Fund with a view to the best interests of the workers' compensation system as a whole, including the financial stability of the system, compensation payable to injured workers, and the standards for the health and safety of workers and the enforcement thereof;
>
> (b) In conducting the review and with respect to any options proposed by the Contractor, the Contractor must take into account the requirements of section 39 of the Act and actuarial rate-making principles; the longer terms risks to funding levels and capital adequacy due to events such as financial downturns, increases in morbidity due to slowly developing occupational diseases, increases in treatment costs and any other relevant factor; and the "smoothness" of year-over-year changes in employer rates;

This report provides options consistent with this brief. The options focus on the larger parameters of workers' compensation legislation that directly impact injured workers, survivors and dependents. These options also impact liabilities of the Accident Fund; each option has been "costed" to quantify the impact on the Accident Fund and WorkSafeBC's ability to provide a sustainable system for the workers, employers and people of the province.

I've included several additional options to address gaps in the coverage profile and provide improvements to the compensation and benefits in cases of workplace fatalities. These additional options are consistent with purpose of workers' compensation and the value of every worker's life. Finally, within this set of options are enhanced authority of the Board of Directors to safeguard the system through timely and equitable actions.

There are, of course, many other options that have a bearing on costs including alternatives related to prevention, enforcement, service, policy, operations and research. Such options are the essential domain of the Board of Directors and senior executive of WorkSafeBC who have authority within the current legislative framework to allocate resources, modify policy, and direct new programs—and consistently do so. Options for further refinement of operations and programs are beyond the scope and time allotted to this review.

Every change has consequences for specific groups. Each option here identifies those most directly affected if the option is adopted, the magnitude of the impact on the Accident Fund and the future sustainability of the system. Some options have large financial implications; others have a lower cost impact. Collectively, these options are designed to meet the objectives reflected in the title: balance, stability, improvement in the best interests of the workers' compensation system.

My thanks to the external stakeholder groups, internal subject matter experts, and dedicated professionals at WorkSafeBC who shared their time, insights, and knowledge to make this review possible.

TJB December 2018

## Contents

| Parameter | BC | Washington* | Alaska* | Alberta | Yukon | Saskatchewan | Manitoba | Ontario |
|---|---|---|---|---|---|---|---|---|
| Maximum insurable/assessable earnings | **$82,700 (2018)** | ~$90,000 to $112,580 Based on Family status (Inferred from Max Benefit at .6 and .75 compensation rate) | ~$100,000 (inferred from Max Benefit at .8 spendable for Married, no dependents) | $98,700 Assessable (2018)/ no max insurable (Sept 2018) | $86,971 (2018) | $82,627 (2018) | $127,000 assessable (2018)/ no max insurable | $90,300 (2018) |
| Maximum Weekly Benefit | 1098 (2018) | $1299 (2017) | $1239 (2017) | $1,238.51 (2017) None (Sept 2018) | $1251.02 (2018) | $1,120 (derived from max insurable) | None | $1098.45 (2017) |
| Compensation Rate | **90% of Net** | 60-75% gross Pre-Injury Weekly Wage | 80% of spendable | 90% of Net | 75% of gross | 90% of Net | 90% of Net | 85% of Net |
| Waiting Period | None | 3 days | 3 days | Non | None | None | Non | None |
| Retroactive Period | **n/a** | 14 days | 28 days | n/a | n/a | n/a | n/a | m/a |
| Cost of Living Adjustment | Canada CPI less 1%, Floor zero, Max 4% ( 0.394268% Jan 1, 2018) | Based on the change in the state's average wage (5% effective July 1, 2018) | Based on COLA in three largest cities; different for non-residents | Based on the change in the Alberta Consumer Price Index (ACPI) for 12 months, ending September 30 (1.2% Jan 1, 2018) | Consumer Price Index for Whitehorse, calculated by using the percent change between the average index for the twelve month period ending October 31st, floor of zero, max of 4% | Annual change in Provincial consumer price index (3.8% 2018) | Based on CPI Manitoba June/June floor of 1%, Max 6% (2.25% 2017) | Canada CPI (1.5% Jan 2018) |
| Duration of Permanent Disability "pensions" | To age 65 or later if predetermined | For the length of disability and can be for life. | Until no longer disabled | January 1, 2018: normal retirement age is considered to be age 65 or five years after your date of accident, whichever is later. New Economic Loss Payment will continue for life. | Loss of earnings ends when legibility for OAS beings (or other reasons) | For length of disability or age 65 | Wage Loss ends at 65; PPD award (pre-1992 claim) or a Permanent Partial Impairment (PPI) award (1992 to present claims) award reassessed every two years. | Loss of Earnings pension paid to age 65. Non-economic loss payable as lump sum or periodic payments that may continue fo life |
| | | * All dollar amounts in this column are $US | * All dollar amounts in this column are $US | | | | | |

*Figure 1- Table of Selected Parameters for Comparison*

# Balance. Stability. Improvement.

## *Options for the Accident Fund*

### Introduction

Work-related injury, disease and death impose human and financial costs on individual workers, their families, employers, and every community in British Columbia. The choices made through legislation, policy and administration don't change that fundamental reality; what they impact is how much of the financial burden associated with that loss will be borne by each party.

Any change to workers' compensation has implications for all parties, particularly the more than 45,000 workers and 4,000 survivors (spouses and non-child survivors) and 700 children who depend on monthly "pension" cheques from WorkSafeBC. BC's 238,000 employers and their 2.4 million workers are affected by the coverage and costs implications of every change made to the workers' compensation legislation. Families, communities and all British Columbians also share in the human costs and financial losses not covered by the workers' compensation system.

WorkSafeBC's strong financial position is not accidental but it is fortuitous. The climb from an unfunded liability position in the early 2000s required sacrifice on the part of workers and employers to preserve the viability and sustainability of the system.

The legislative reforms of 2002[1] substantially reduced claim liabilities but had real-world impacts on workers. The compensation and benefits[2] defined by the *Workers Compensation Act (Act)* were amended, limiting future permanent disability "pensions[3]" to a retirement age (presumed to be 65), reducing cost of living adjustment frequency from twice to once a year, and changing the formula for those increases from full Consumer Price Index (CPI) to CPI less 1% for pre-2002 and future pension recipients. The indexation change alone has reduced worker pensions (and cash awards to workers and survivors) by $584 million between 2002 and 2017 The imposition of a presumed retirement age, departure from full CPI, changes to the compensation rate (from 75% of gross earnings to 90% of net earnings) and restricting consideration of loss of earnings to cases where the loss was "so exceptional" also resulted in lower payments to workers but had the desired effect of lower cost of claims and a decrease in claim liabilities. These and other reforms

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[1] Bill 49 - *Workers Compensation Amendment Act, 2002*

[2] This report uses "compensation" to refer to temporary and total disability entitlements based on earnings from employment and payable to the worker. "Benefits" in this paper primarily refer to payments not tied directly to the worker's average earnings and/or payable to a person other than the worker. Benefits include payments to doctors, hospitals, physiotherapists, pharmacies (or to reimburse workers for pharmaceuticals and supplies), as well as payments to survivors and dependents.

[3] The term "pensions" is used in this report to refer to periodic (monthly) payments of permanent disability awards, survivor benefits and dependent benefits.

altered the injury cost equation and increased the share of the financial burden of work-related injury, disease and death to workers, their families and the greater community, including tax payers through the increased externalized costs to the social welfare system.

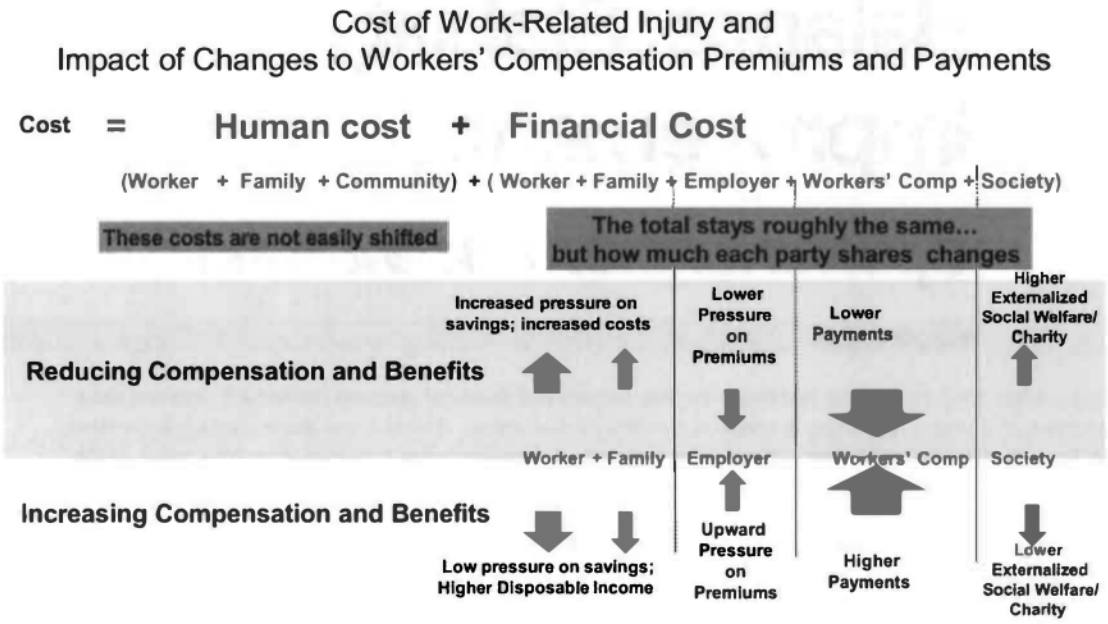


*Figure 2 - Human and Financial Cost of Work-Related injury*

Employers, too, had to bear increased costs. In the years following the 2002 reforms, rateable employers contributed more than a quarter billion in revenue ($282 million 2003 through 2006) in excess of the required cost rate through the premiums they paid. As the unfunded liability was eliminated and financial performance remained stable to strong in the years following, rateable employers received offsets approved by the Board of Directors of nearly $1.8 billion (2007 through 2018) against the total cost premium[4].

Lower premiums are not simply a product of allocating gains from exuberant financial markets to offset premiums. Employers, workers, union, and other participants in the workplace have achieved lower injury rates. Investments in new plant and equipment have removed hazards. Safety associations have extended the reach and specificity of the workplace health and safety message to specific industries. These improvements in the workplace have allowed the Board of Directors to reduce the premium rate paid by employers by nearly a quarter from more than $2.00 per hundred dollars of assessable payroll in 2002 to $1.55 in 2018.

The investment strategy, financial policies and fiduciary oversight of the Board of Directors have also played an important role in WorkSafeBC's strong funding position. The 2002 and subsequent reforms redefined the role and authority of the Board of Directors. Their mandate to "act with a view to the best interests and objectives of the workers' compensation system[5]" focused attention to funding requirements, active consideration of risks, and refinement of strategies to manage threats to the viability of the Accident Fund while assuring its sustainability.

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[4] Premium rates have now been set for 2019. Extending the analysis through 2019 adds another $0.2 billion "offset against the total cost premium" resulting in a total to $2.0 billion (for 2007 through 2019).
[5] Section 84(1)(b) *Workers Compensation Act*.

While the Board of Directors has been able to direct funds to support lower premium rates to employers, it has been constrained from acting on compensation and benefits. Despite sharing in the burden of achieving the current funding level, workers have seen no significant offsets to reduce the financial burdens of work-related injury and disease. The Board of Directors guides the administration of the legislation, approves programs and authorizes expenditures within the existing framework but cannot alter the main compensation and benefit parameters defined in the *Workers Compensation Act*.

Many of the compensation and benefit parameters "hard coded" into the legislation remain among the highest levels among workers' compensation systems. The 90% of net compensation rate, for example, is equivalent to or greater than the compensation rates of neighbouring and comparator jurisdictions. Other parameters have not kept up with social and economic changes in British Colombia workplaces. The legislated formula that determines maximum insurable earnings does not reflect the distribution of earners, effectively reducing the compensation rate for more than 20% of workers below 90% of net. Similarly, the presumed retirement age of 65 no longer reflects the increasing participation of older workers in the workplace.

This review provides a series of options for reforming the compensation and benefits currently defined in the legislation. The positive funding level of the Accident Fund has already contributed to lower premium rates for employers, increased prevention programs, and services to workers and employers because the Board of Directors has the authority to act. Further improvements to compensation and benefits require legislative change. The options presented here, if implemented, will reduce the financial burden workers and their families must bear as a result of work-related injury, illness, disease and death. They will also reduce the externalization of costs to others including taxpayers.

In the post "global financial crisis" world, managing in the "new normal" environment is not without continuing risk. There are arguments for continuing with the *status quo*. Volatile markets, sudden disasters, and emerging hazards are ever present; economic cycles persist and threaten employment security of workers and financial stability of employers; trade wars, climate change is disrupting the workplace environment as well as posing risks to the Accident Fund investments. Demographic and societal change are altering who works and for how long. Technology is overturning traditional patterns of work and presenting both challenges and opportunities across wide sectors of the economy. Any of these risks can undermine the financial stability of the workers' compensation system, threaten its ability to compensate workers, and diminish the ability of WorkSafeBC to maintain, promote and enforce health and safety standards that benefit workers and others in the workplace.

The Board of Directors recognizes these risks. Over the last three years it has refined its reserves and funding policies accordingly. After taking prudent measures to manage these risks, the Board of Directors has set and achieved its financial adequacy targets. This paper explores options for what comes next: How to strategically deploy of the unallocated "excess surplus" to further secure the workers' compensation system for the workers, employers and people of BC.

WorkSafeBC has historically provided compensation and benefits consistent with the upper range provided by other workers' compensation systems. Figure 1 in this report provides a table that highlights some of the key parameters defined by a selection of workers' compensation jurisdictions. While BC compares well in many respects; differences among comparators demonstrate where improvements to coverage, compensation and benefits have been made by other jurisdictions, and possible opportunities for BC. Appendix F provides financial comparators in terms of payroll, cost to employers and benefits paid to workers using standard workers' compensation ratios. These data demonstrate WorkSafeBC's position relative to neighbouring and comparator jurisdictions.

## Options and Context

The options presented here advance the income security of WorkSafeBC's compensation and benefits to injured workers, survivors and dependents, improving coverage within the funding framework and capacity of the system.

For the purposes of developing the options in this review, three themes were given priority:

- Balance: evening the distribution of benefits of WorkSafeBC's financial position
- Stability: maintaining the sustainability and comparability of the system
- Improvement: filling gaps in coverage for the most severely injured, disabled and fatality cases

This report describes the financial status of WorkSafeBC, how the system is funded and, crucially, how imbalances—both positive and negative—have been dealt with in the past by various workers' compensation jurisdictions including WorkSafeBC. This discussion highlights the fundamental assertions and key concepts underlying the system against which options may be judged and considered.

The options presented in this paper are selective and not exhaustive in range or detail. They represent actionable options developed in consideration of stakeholders' views, the technical assistance of WorkSafeBC's professional staff, and the comparative context of other workers' compensation systems, particularly those in Canada. Each option provides a description and rationale for the proposed change. High level impact on the Accident Fund and funding model are discussed in most of the options.

The options proposed are generally consistent with legislation, policies and practices in place in neighbouring workers' compensation systems in Canada and the US as well as other comparators in Canada and elsewhere but are responsive to British Columbia's particular circumstances. Other jurisdictions face similar issues but the timing and extent of past reforms result in a variety of solutions, some of which may not meet the needs of WorkSafeBC's workers, employers or community. They do, however, provide a context in which to examine a range of alternatives rather than an isolated proposal.

It is possible to continue within the defined parameters of the current legislation. The *status quo* option provides leeway for the Board of Directors to continue to control costs, direct investment strategy, create reserves, and alter services levels. However, the *status quo* does not address the continued erosion of purchasing power of past awards, changing workforce conditions, or the need to protect the value of current and future compensation for permanent disability.

Beyond the *status quo* option, the options presented here are not intended to be mutually exclusive but to provide a coherent and logical set of legislative actions for consideration.

The financial status, methods, and impacts of changes to parameters are complex topics. In discussions with stakeholders, the need for increased clarity about these matters became apparent. This report contains a generalized representation to aid in the consideration changes that impact the Accident Fund and funding model.

Stakeholder views were important to the development of these options. Employer representatives in particular did not oppose the need for reform as long as that reform was supported by evidence and assures the viability, stability and predictability of the workers' compensation system. They expressed concern over the potential for large swings in costs or moves that did not account for impacts on premiums. Labour representatives shared the desire for a system that preserved the promised compensation and benefits provided under the legislation. Stakeholders interviewed acknowledged the reduction in compensation and benefits workers endured in order to alter the funding trajectory of the late 1990s and the sacrifice injured

workers and their families endured as a result of the 2002 reforms. Professional staff charged with policy development, administration and operations identified specific issues that inhibit WorkSafeBC from providing optimal services to the workers, employers, families, and communities of the province.

The options described in this paper will not satisfy all stakeholders. The desire to see complete or perfect information and exhaustive analysis to support each option is understandable but beyond the allotted time, available research, and scope of this review. Those that seek an unwinding of past legislative decisions on the basis of righting the perceived wrongs of the past will be similarly disappointed. The social, demographic, technological and economic realities of today have altered the environment; a return to the past is no longer practical nor advisable. The options proposed here are supported by a rationale sensitive to today's reality and trends in workers' compensation legislation. Each option includes estimated impacts on the Accident Fund and premium rates based on the best information available and intended to inform the deliberations of WorkSafeBC's Board of Directors.

No legislative provision, policy position or practice directive can change the reality of work-related injury, disease or death. Injured workers and their families will always bare human and financial loss. Workers' compensation can only lessen some of the financial burden and only to the extent its financial status for the long term will allow. These options will improve the outcomes for many within the financial capabilities of the present and with due regard to the risks that lie ahead.

## Summary of Options

Option 1, The ***status quo***, would see no change to the basic parameters of compensation and benefits.

Option 2, **Increase the maximum insurable and assessable earnings to $100k per year**. This addresses a shortfall in the coverage. More than 20% of workers in BC report earnings above the maximum insurable earnings increasing their financial vulnerability in the event of prolonged work-related disability.

Option 3, **Increase presumed age of retirement from age 65 to 70**. This addresses a fundamental societal shift in employment patterns since the 2002 reforms that established a presumed retirement age of 65. This option would increase this reference age to 70 and provide greater coverage for the increasing numbers of workers working beyond age 65.

Option 4, **Provide a one-time adjustment to restore the value of currently paid pensions to their purchasing power in 2002 or more recent year when the pension was established.**

Option 5, **Revise the cost of living provision of the legislation by altering the current CPI-1% such that full CPI would apply unless the Accident Fund falls below the established fully funded level**. This reflects policies in many defined benefit pension plans and will increase the flexibility of the board of directors to act in the best interests of the works' compensation system.

Option 6, Assumption **of maximum earnings in the event of a work-related death**. This option would ensure survivors and dependents receive the maximum benefit possible.

Option 7, **New lump-sum payable to the Estate of a fatally injured worker**. This option recognizes the work-related death regardless of survivors with a one-time amount payable to the estate and would give standing to the Executor of an estate to initiate a claim.

Option 8, **Increased powers to secure and preserve assets for the Accident fund**. This set of changes improve the ability of WorkSafeBC to secure funds owed by delinquent and bankrupt employers and to retain funds for the Accident Fund in a way similar to other large public pension plans.

Option 9, **Permit diagnostic and treatment expenditures prior to claim acceptance**. This option formalizes the ability of WorkSafeBC to authorize and pay for diagnostic and treatment prior to claim acceptance in cases where timely treatment is likely to lessen or prevent more serious harm or disability.

# Part 1

# Concepts, Context and Definitions

## Fundamental Assertions

The options in this paper are developed in the context of WorkSafeBC's mandate and model. That context is based on the following fundamental assertions:

- The power to make and alter the parameters of workers' compensation legislation is the exclusive jurisdiction of the legislature.

- The legislation, the *Workers Compensation Act (Act)* creates the Workers' Compensation Board of British Columbia (operating under the name WorkSafeBC), to administer that legislation.

- The *Act* mandates the Board as follows (Section 36):

  (1) The Board must continue and maintain the Accident Fund for payment of the compensation, outlays and expenses under this Part and for payment of expenses incurred in administering Part 3 of this Act.

  (2) The Board is solely responsible for the management of the Accident Fund and must manage it with a view to the best interests of the workers' compensation system.

- The *Act* defines the parameters of benefits and compensation payable; the Board of Directors approves and publishes the policy for administering the provisions of the legislation

Under this framework, WorkSafeBC operates as the exclusive workers' compensation insurer for employers. It is also the occupational health and safety (OH&S) regulator, OH&S inspectorate for workplaces, and claims administrator for the defined benefits and compensation for the injured workers and survivors within its jurisdiction.

## The workers' compensation system

The workers' compensation "system" is not defined by legislation. It is, however, the product of the mandate, structure and operations of the workers' compensation insurer in the context of its jurisdiction and scope, particularly the scope of who and what is covered.

WorkSafeBC shares many characteristics with other workers' compensation systems. For this discussion, certain commonalities and differences are important, particularly when evaluating policy options already established in comparator and neighbouring workers' compensation jurisdictions.

## Workers' compensation insurance and Occupational Health & Safety

WorkSafeBC is the exclusive provider of workers' compensation insurance in British Columbia. Like most US, Australian and Canadian provinces and states, employers require workers' compensation insurance in order to operate in this province. Like half the workers' compensation boards in Canada (and some in Australia and the US), WorkSafeBC also has responsibility for OH&S functions including regulation, inspection, enforcement and prevention/promotion. The following table shows how the OH&S functions are distributed across Canadian jurisdictions.

### OH&S Mandates Canada (condensed from AWCBC.org)

| Jurisdiction | % Employed Labour Force Covered | Enforcement | Regulation | Training/ Education | Prevention |
|---|---|---|---|---|---|
| PE | 98.04 | WCB | WCB | WCB | WCB |
| NL | 97.61 | Government | Government | WHSCC | WHSCC |
| BC | 97.61 | WorkSafeBC | WorkSafeBC* | WorkSafeBC | WorkSafeBC |
| YT | 97.32 | WCB | WCB | WCB | WCB |
| NT/NU | 97.16 | WSCC | WSCC | WSCC | WSCC |
| QC | 92.6 | CSST | CSST | CSST | CSST |
| NB | 91.39 | WorkSafeNB | WorkSafeNB | WorkSafeNB | WorkSafeNB |
| Canada | 84.38 | | | | |
| AB | 84.36 | Government | Government | Government | Government |
| MB | 77.4 | Government | Government | Government | WCB |
| ON | 76.24 | Government | Government | Government | Government |
| NS | 75.4 | Government | Government | WCB | WCB |
| SK | 71.3 | Government | Government | Government | Gov. & WCB |

AWCBC KSM 22 (2016 data)

*Figure 3 - Workers' Compensation Coverage and Occupational Health & Safety Mandate*

Note that the trend in Canada is to assign the OH&S functions to the workers' compensation authority where workers' compensation coverage exceeds 90% of the employed labour force; WorkSafeBC's mandate is consistent with this trend.

Under the BC model, virtually all employers are required to be insured and WorkSafeBC is the only entity mandated to sell workers' compensation insurance in this jurisdiction. There are few exemptions or exceptions; for example, certain corporations (such as personal services corporations), sole proprietors,

partnerships and independent operators with no employees are excluded but may "opt in" for their own coverage. Virtually all entities with employees are within the scope of coverage in BC. More than 97% of workers in the province are covered by WorkSafeBC. Federal government employees are covered by the *Government Employees Compensation Act*, which WorkSafeBC administers under contract for the Government of Canada.

Most employers within the scope of coverage are assessed and pay a percentage of their assessable payroll (commonly called a premium) for their workers' compensation insurance coverage. The Federal government and a few other employers[6] are "self insured" but the administration of injury claims from these employers is carried out by WorkSafeBC. WorkSafeBC receives premium revenue equal to the claims and administration cost to manage their claims. These employers also deposit funds with WorkSafeBC in trust to cover expected ongoing costs but retain liability for future costs of their claims.

## Implications of the Scope of Coverage

The near universal scope of coverage has important implications. Inclusion in the scope of coverage provides an exclusive remedy for work-related injuries. Workers are statute-barred from suing employers and other workers defined under the *Act*.

A second implication impacts who pays medical costs associated with work-related injury, illness and disease. Once an injury or disease is accepted as a workers' compensation claim, all medical diagnostic, treatment, and rehabilitation costs are payable from the Accident Fund. The range of healthcare expenses includes all necessary hospital and medical care, prescriptions, orthotics, prosthetics and similar items. A decision to exclude a category of employment from coverage externalizes these medical costs to the provincial medical services plan. (See Appendix B for more background on healthcare cost and the *Canada Health Act*). Changes to the current scope of coverage are not considered in this review.

Inclusion in the scope of coverage for insurance includes coverage under the OH&S mandate of WorkSafeBC and within provincial jurisdiction. Workers and employers under Federal jurisdiction must comply with Labour Canada regulations concerning workplace health and safety. Changes in this current structure are also excluded from this review, however, none of the stakeholders consulted supported any change to the existing structure, scope or mandate.

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[6] Sector 81 Employers: Canadian Pacific Ltd. and associated companies (including CPR and Cominco), Burlington Northern Inc., Air Canada, Canadian National Railway, Via Rail Canada Inc., and Government of the Province of British Columbia

## Historic Compromise [Sidebar]

Workers' compensation insurance in BC follows the basic model of most Canadian workers' compensation system based on the principles set out by Sir William Meredith's work 1910-1913 in Ontario. Often termed the Historic Compromise, the BC legislative papers summarize the value proposition this way:

> *COMPULSORY STATE INSURANCE RECOMMENDED*
>
> *We believe that, though* ***each class surrenders to the State certain rights, it is in the public welfare that this should be so. The employer in submitting to the levy of taxes upon his industry receives the benefit of protection from expensive litigation, the workman in return, though he loses the precarious right to sue in tort for damages, receives in return a stipulated amount based upon his economic position in the community. Both the employer and the employee, as well as the State as a whole, benefit from the elimination of the friction and loss which necessarily attends all litigation.*** *Your Commissioners have had recommended to them and discussed before them various systems of State insurance, particularly that in force in the neighbouring State of Washington, as well as the proposed legislation of the State of Oregon and the Province of Ontario. After a consideration of the legislation of the various unions of the United States and the Statute drafted by Sir William Ralph Meredith for the Legislature of the Province of Ontario, the system of compulsory insurance as proposed by Sir William Ralph Meredith commends itself in the main to your Commissioners as the most suitable to the jurisdiction of our Province. Several of the American Acts are specifically devised to overcome constitutional restrictions; fortunately our Canadian Legislatures are not hampered in regard to constitutional limitations as to their jurisdiction. [Emphasis added].*
>
> *(p. 13, Royal Commission on Labour, 1914)*

This represents both the Historic Compromise and the fundamental aspect of insurance adopted at the inception of workers' compensation in British Columbia. Employer liability for work-related injury and insurance to cover that liability predates workers' compensation systems. Employer liability laws still exist in some countries; individual employers are liable for work-related injuries and workers may be entitled to take action to recover losses from the employer. The shortcomings and inequities of that system were common and costly to all parties. The solution Meredith proposed and the BC legislators adopted was a compromise that pooled and limited the liability of employers and provided greater certainty to workers. Workers' surrendered the right to sue in exchange for no-fault, defined financial compensation; employers gained protection from suit, surrendering defenses against liability beyond the work-relatedness of injury, illness, disease or death. The underlying insurance principle was part of Meredith's solution: a transfer of financial risk from the insured to the insurer in exchange for a premium for the term of the insurance.

Courts have considered and upheld the exclusive remedy of workers' compensation on the basis (in part) that the compensation and benefits provided by workers' compensation are an effective replacement for tort remedies. Temporary compensation for lost wages, permanent disability awards for loss of function or earning capacity, and other benefits such as health care and vocational rehabilitation that would form the basis of judgements or settlements in tort, are reflected in workers' compensation and benefits; workers' compensation boards fill the role of administrative tribunal and trustee of the awards and benefits to be paid in lump sum or periodically.

## Workers' Compensation *Laws* vs. Workers' Compensation *Insurance*

Employment-injury protection schemes are common in developed countries[7]. Governments pass legislation that mandate employers provide injury insurance or workers' compensation for their employees. Workers' compensation laws prescribe the scope of coverage (who and what is covered) and define the benefits to be paid. Workers' compensation insurance is the predominant form of coverage in Canada, the US and Australia. Workers' compensation insurance provided exclusively through a state workers' compensation insurance fund is the model in Canada, common in Australia but less common in the US, although about half the US states have state funds that compete with private insurance providers. Regardless of the model, workers' compensation insurance provides compensation and benefits for work-related injury, illness and disease.

Workers' compensation insurance is most similar to property and casualty insurance. Insurance is a transfer of financial risk associated with relatively rare but costly events from the insured to the insurer in exchange for a premium. Insurers underwriting that risk establish their premiums based on the expected claim costs, administration and other costs (and profit, in the case of private insurers). Premiums may be modified by individual experience. Homeowners will be familiar with home insurance against a specific risk such as fire or water damage from a water system failure in the home. Home fires are very rare but when a house burns down, the cost can be very high; water damage is more common but can have significant costs; home insurance protects homeowners from those costs. Premiums for home insurance may be discounted based on experience (years claim free, for example).

Work injury, illness and death are relatively rare events. Catastrophic work-related injuries and deaths are getting rarer but the human and financial costs continue to be immense. Workers' compensation *laws* limit individual employer liabilities for work-related injuries by defining the compensation and benefits payable; workers' compensation *insurance* provides the mechanisms to fund and administer the insurance, compensation and benefits within the legislated framework.

In the context of this report, aspects of both workers' compensation law and workers' compensation insurance are considered. All options that alter the defined compensation and benefits in the legislation have implications for the insurance aspect of workers' compensation.

**Key Concepts**

**Workers' compensation *laws* define the scope of coverage, compensation, and benefits payable for work-related injury illness and death.**

**Workers' compensation *insurance* is a particular mechanism for implementing workers' compensation laws through the use of insurance principles and processes.**

## The Funding Model

The accounting for workers' compensation insurance funding, reserves and liabilities is complex. As one stakeholder said, "There are twenty people in the world who understand how WorkSafeBC funding works... and 18 of them work for the Board." To inform the consideration of options discussed in this review, generalized funding and premium models are provided in this narrative. Key concepts that apply to the options in this paper are presented in simplified form in this section (with some additional explanation in

[7] ILO, *World Social Protection Report 2017-19: Universal social protection to achieve the Sustainable Development Goals.*

Appendix C). A more detailed explanation of the current funded status is contained in the *2017 Annual Report and 2018-2020 Service Plan*.

WorkSafeBC assumes covered-employers' financial risk of work-related injuries to their workers on a calendar year basis. That financial risk includes the costs that may arise from injuries that occur and are paid in the year but carries on well after that. Many cases will involve compensation or medical expenses for the life of the injured worker, widow/widower or dependent survivor. Moreover, there may be claims that are accepted and first paid many years after the coverage year, potentially long after the employer has ceased to exist.

WorkSafeBC follows a fully-capitalized, casualty insurance model created by statute, the *Workers Compensation Act*. Unlike private insurers, mutualized insurance entities, and some Crown corporations, there are no shareholders. The Workers' Compensation Board is a "statutory agency" created by statute to administer the *Act*. In the common taxonomy of workers' compensation, WorkSafeBC is a not-for-profit, exclusive state fund operating as the sole provider of workers' compensation insurance in its jurisdiction (see Appendix A for descriptions of other workers' compensation models).

Insurance is the transfer of financial risk in exchange for the payment of a premium. To be sustainable, the financial risk the insurer takes on must be quantified and covered by the premium, investment income and appreciation of held assets over the time it takes to discharge the full cost of claims (as well as expenses and profit)[8].

Unlike most property insurers covering losses for a house fire or flood, the period of time over which a workers' compensation insurer is required to make payments will be lengthy. About 5% of benefits from current year claims are likely to be paid up to a year following injury; more than 50% of payments and associated administration will occur 15 or more years into the future. This "long-tail" of liability means the money collected in a given year must be held and managed for decades beyond the coverage year. For example, in 2017, 42% of current pension claims (long-term disability compensation and fatality benefits paid to survivors and dependents) were not attributable to current, active firms.

To "provide for the compensation, outlays and expenses" related to the administration of claims from all years (as well as other activities including OH&S and prevention), the legislation creates the Accident Fund. It is the Board of Director's responsibility to continue, maintain and manage the assets of the Accident Fund in the "best interests" of the worker's compensation system, keeping in mind the long-term nature of its liabilities.

The Accident Fund receives revenue from insurance premiums, administration fees, penalties, interest on investments and sale of assets. Expenditures from the fund go to make payments to workers (as well as survivors, and dependents) and on their behalf to hospitals, healthcare professionals, pharmacies, medical supply houses and others for medical diagnosis, treatment and rehabilitation expenses. Expenditures also cover the administration costs, acquisition and maintenance of facilities, as well as operations consistent with the OH&S and prevention mandate defined by the legislation.

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[8] There are a number of insurance pricing models, and wide variation within them. This review discusses the funding model used by WorkSafeBC. For more information on insurance funding and pricing models, see Stephen P. D'arcy And Richard W. Gorvett, "A Comparison Of Property/Casualty Insurance Financial Pricing Models," *Proceedings Of The Casualty Actuarial Society, Volume LXXXV, Part 1 No. 162* Available at https://www.casact.org/pubs/proceed/proceed98/980001.pdf

**Key Concept**

**WorkSafeBC is the workers' compensation insurer, taking on the financial risk of defined compensation and benefits arising from work-related injuries to workers in exchange for a premium paid by the employer.**

## Premium Rate-making

Premium pricing and rate-making methods for insurance vary[9]. WorkSafeBC classifies each enterprise by its industrial activities and clusters those with similar risks into rate groups. Using data from past years and other sources, WorkSafeBC develops premiums based on the expected cost of new injuries arising in the coming year. Rateable employers are assessed by applying that premium rate to their individual assessable payrolls; rates may be modified based on a particular employer's past claim cost relative to other similar employers (Experience Rated Assessment or ERA). An insured entity may have multiple classifications depending on the diversity of its activities. More commonly, an enterprise will have one classification and the payroll of all individuals (up to the maximum assessable earnings) "in and about" that industry is subject to a premium based on each $100 of payroll.

Most but not all workers' compensation insurers have a maximum assessable amount for each individual on an employer's payroll. The maximum assessable amount is usually equal to the maximum insurable amount for compensation. WorkSafeBC's maximum assessable and insurable earnings are set at $82,700—an amount derived from the relationship in Section 33 (8) to (10) of the *Act*.

Note that BC's maximum assessable is below the maximums in many of its neighbouring jurisdictions and comparators (see *Figure 1*). It should also be noted that a higher maximum does not typically mean a higher premium rate. Provinces with the highest maximum assessable values tend to have lower premium rates. While the reasons for this may differ from province to province, many higher wage earners are in occupations or positions that have lower frequency of injuries. Lead hands, supervisors, and managers may have earnings at or above maximum levels but may also be at lower risk of traumatic injury than others in and about the industry by virtue of their position. Although the frequency of losses may be lower, the financial value of each loss may be significantly higher.

In addition to future claim liabilities for compensation, rehabilitation, medical costs and other benefits, the premiums collected from employers for each year must also cover the administration and infrastructure costs of operating the insurance and fulfilling the occupational health and safety (OH&S) and prevention mandates.

The liability for injuries that occur in a given year may take decades to fully develop. The full claim cost, however, can be discounted by the expected required rate of return on investments over the time payments related to claims for that year may be paid. The required rate of return is established by the Board of Directors. Through prudent investment, effective rehabilitation, and diligent oversight, ideally the funds collected as premiums from a year will cover the eventual full costs arising from that year's injuries.

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[9] This review does not examine the premium pricing or rate-making beyond a simplified model to support the presentation and consideration of the options contained in this paper. The basics of this topic are covered in the following text: Geoff Werner and Claudine Modlin *Basic Ratemaking* (Fifth Edition), Casualty Actuarial Society, May 2016 available at https://www.casact.org/library/studynotes/Werner_Modlin_Ratemaking.pdf

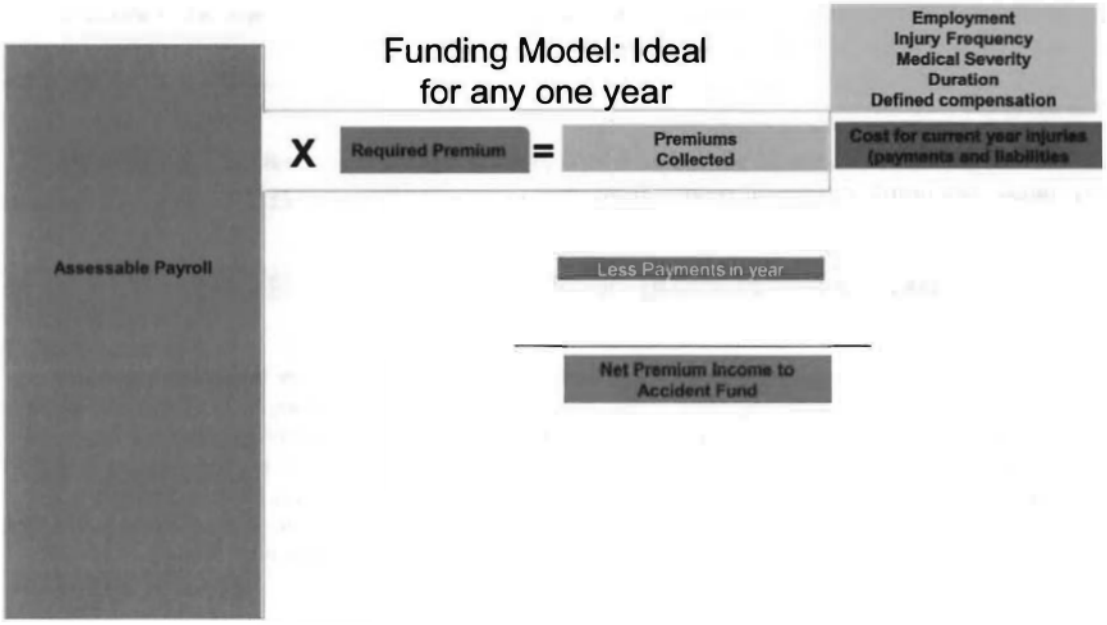


*Figure 4 - Funding Model: Ideal Case*

The premiums assessed on payroll and collected from employers for any year are intended to cover the costs of claims and other expenses related to that year. In principle, each generation of employers is self-funding and the population of workers and survivors can count on the defined compensation they were assured at the time of injury for the full duration of their entitlement even if the employers responsible for paying premiums at the time of injury are no longer in existence.

The registered base of employers is not constant. For example, only 17.5% of employers that are active at this writing were active 20 years ago[10]. About 43% of long-term disability and fatality benefits paid each year are for claims where the accident employer is "inactive".

In the ideal situation, the premiums of each years' employers and the future investment returns on those premiums will cover all the costs for the full term of all claims that are attributed to that year for the duration of all the claim entitlements and administration. If the premium charged is too low, there will be a shortfall in the ability of the insurer to pay entitled benefits; if the premium is set too high, then more money than needed is taken away from employers (eliminating the employer's options to use those amounts for profits, new equipment, business expansion, etc.) Note that the investment and premium part of the funding model is accounted for on a smoothed accounting basis so that changes, shortfalls and excesses will be amortized over five years. This prevents steep transitions in premium rates over short periods of time.

One way to think about workers' compensation insurance is to consider each year's premiums and claims liabilities as one book of insurance. At the end of the most recent year, much of the premium income remains to cover the liability of all future compensation, benefits and administration expenses. The balance in the book at the end of the year is substantial but will decline as time passes and expenditures are made on that year's injuries. Following this analogy, older volumes will have asset and liability values; the older the volume, the lower the asset and liability values. The aggregate sum of all volumes' assets compared to the

[10] There are 251,985 currently Active, Real Employer CUs as of October 20, 2018. 44,179 of those have a first start date before 1998-11-20. 17.5% of Employer CUs that are active now were active 20 years ago.

outstanding liabilities of all books determines the funding status. If investment returns are as anticipated and costs are as expected, the full set of all books will be balanced.

**Key Concept**

**All current and future year costs associated with injuries in a given year should be covered by the premiums (and future investment returns from those premiums) from that year.**

## Imbalance in the funding model

The ideal model may not generate ideal results in the real world. Sudden changes in markets can cause sectors to contract quickly, reducing payrolls, the basis on which premiums are assessed. Declining labour markets can drive up claim duration and reduce return-to-work alternatives without enhanced physical and vocational rehabilitation or retraining. In centres where a significant sector of the employment experiences a prolonged decline, alternatives for re-employment of injured workers will decline, often resulting in workers' dislocation or relocation in search of suitable and available employment. The converse is also true. Rising markets, sustained demand for labour, changes in technology can reduce injury frequency, severity and duration of disability resulting in lower than anticipated claim costs.

Managing the imbalance from one year may be corrected by amortization in the subsequent years. Rates may be adjusted to manage or average the adjustment in these following years.

Economic cycles, new occupational diseases, financial recessions, depressions, natural disasters, and many more factors can impact claims costs or anticipated investment growth or income. Workers' compensation insurers, therefore, may set up reserves in anticipation of these risks (more on reserves below).

The theoretical balance of the model is not always achieved. *Figure 5* shows the total cost and premium rates over the last two decades:

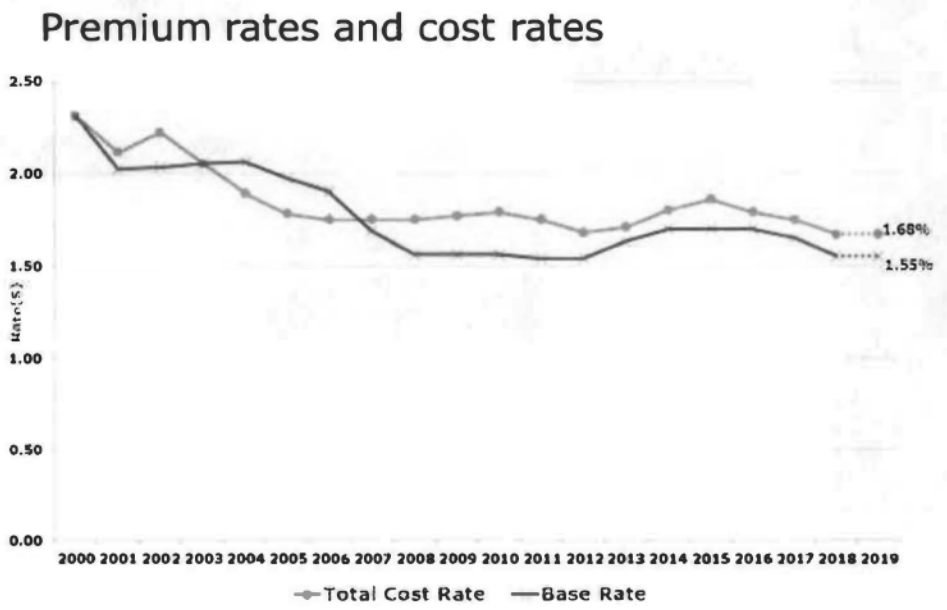


*Figure 5 - Total Cost Rate and Base Premium Rate 2000-2019*

*[As noted in the introduction, the 2002 legislative changes in compensation and benefits reduced claim liabilities substantially but the unfunded liability remained. In the following years rateable employers contributed more than a quarter billion in revenue ($282 million 2003 through 2006) in excess of the required cost rate through the premiums they paid. As the unfunded liability was eliminated and financial performance, in general, remained strong in the years following, rateable employers received offsets of nearly $1.8 billion (2007 through 2018 or $2.0 billion through 2019) against the total cost premium.]*

Conceptually, the premium rate charged each year should equal a calculated cost rate that includes all costs that have arisen or will arise going forward (often termed "incurred" costs) for that year's injuries. Premiums greater than this required cost rate may be necessary to offset a shortfall in the funding model from previous years or a deficiency in the Accident Fund (as shown in Figure 6). This higher premium collected increases revenue to the Accident Fund, increasing the employers' cost of production and may limit employers' options to invest in new plants and equipment, create new jobs, improve wages and benefits and return profits to shareholders.

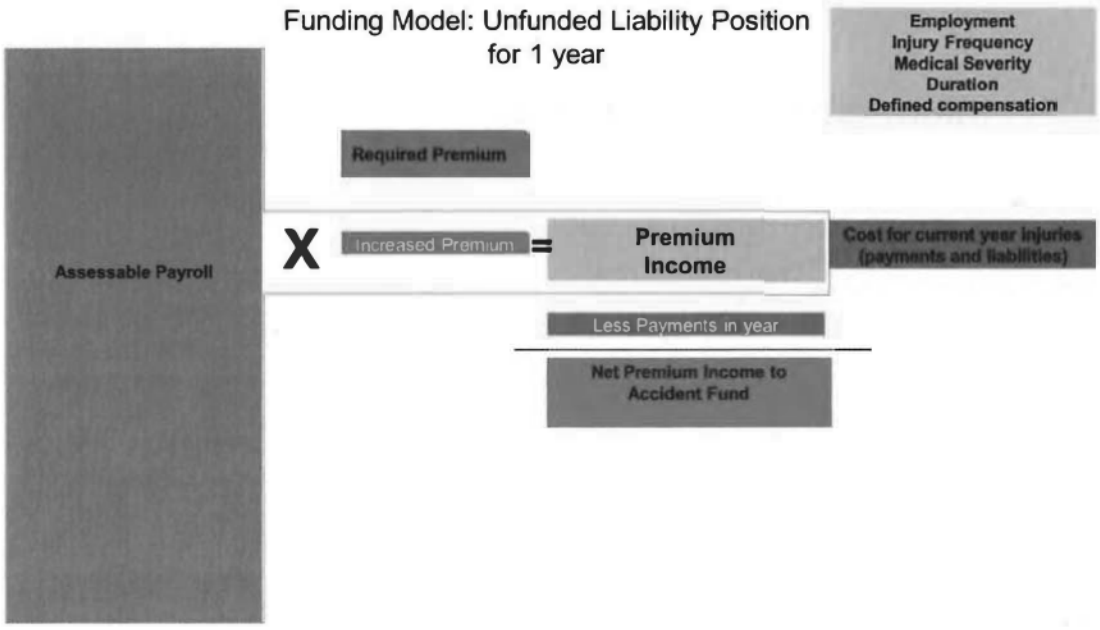


*Figure 6- Funding Model: Unfunded Liability Case*

In the case where there is no excess surplus, premium set below the expected cost rate result in the current generation of employers not paying the full cost of work-related injuries, illnesses and deaths that arise in relation to employment. If the shortfall is shifted to the future, it may represent an intergenerational transfer of costs from current employers to the employers of future years. If the shortfall is funded from reserves from past years, then the premiums and revenues of the past are subsidizing the losses associated with current employers. Transfers from reserves to support the lower premium or revenue shortfalls reduce future income potential and restrict the range and magnitude of other choices.

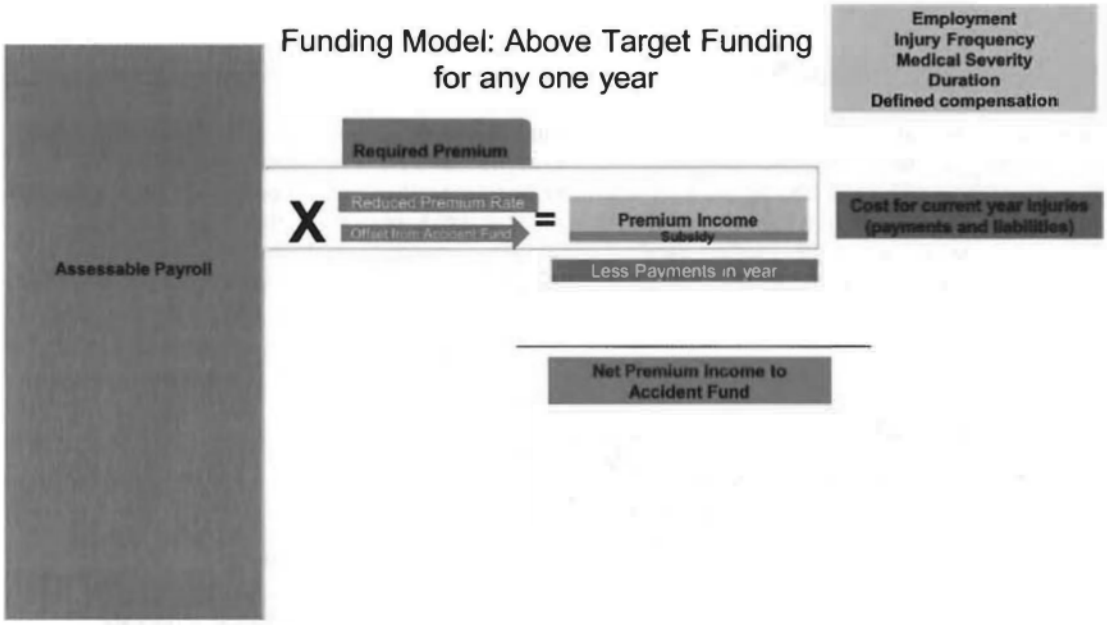


*Figure 7 - Funding Model: At or above Target Funding Level with Offset*

Supporting the current actual costs with recent investment gains (or excess surplus above the target level) results in a lower base premium rate but sets up the potential for a rate-shock scenario when gains (even if amortized) that enabled lower premiums are no longer available. Figure 7 illustrates how an offset works to support a lower premium when funding targets are fulfilled. The offset is a subsidy to the rate, reducing the effective charged premium. Supporting the current actual costs with recent investment gains (or excess surplus above the target level) results in a lower base premium rate but sets up the potential for a rate-shock scenario when gains (even if amortized) that enabled lower premiums are no longer available.

**Key Concept**

**Imbalances in the funding model may result in intergenerational cost transfers.**

The Board of Directors has the authority under the legislation to set premiums, authorize special levies, implement policies to moderate changes to premium rates. For example, a "capping policy" moderates changes in premium rates from year to year; unappropriated balance and accumulated other comprehensive income (or losses) are amortized over five-years through adjustments to future premium rates. In any given year, the combination of that year's portion of the amortized gains and losses from previous years may result in a net upward or downward effect on the premium rate.

**Key Concept**

**Policies set by the Board of Directors mitigate against sharp changes to premium rates.**

## The Accident Fund

Each year, a fraction of the eventual full cost of the claims arising from injuries in a given year are paid in the accident year (about 5%). The aggregate of the remaining funds from the current accident year premiums (about 95%) and from all previous years (put aside in previous insurance years to pay claims into the future) form the largest part of the Accident Fund. The revenues from investments and premiums collected in the year add to the Accident Fund. Expenses for claims made in the year, regardless of year of injury, deplete the fund, as do expenses for administration (including systems, operation of facilities, staff, etc.).

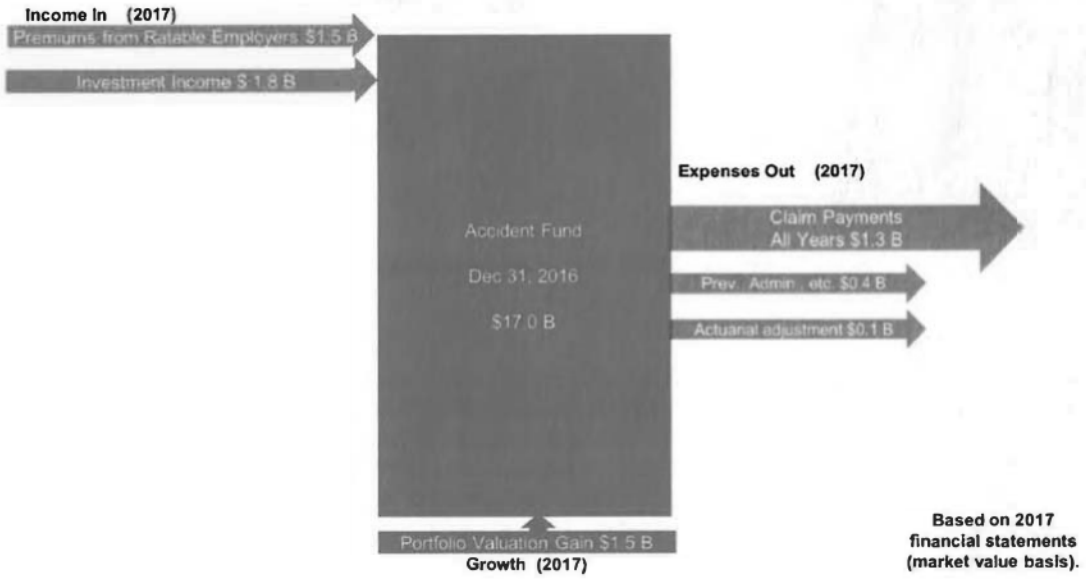


*Figure 8- Accident Fund: 2017 Representation*

Although not to scale, *Figure 8* illustrates the relative impact of current year income and expenses on the Accident Fund.

Very little "cash" is held in the Accident Fund. The value of the Accident Fund at any given point in time is dependent on the value of the investment portfolio that holds WorkSafeBC's assets.

The Board of Directors develops investment strategies and manages the Accident Fund to meet certain objectives. Primary among those objectives is the security of the funds entrusted to the Board to pay compensation and benefits part of the social contract of the Historic Compromise. The value of the assets in the Accident Fund and the value of the liabilities against the Accident Fund are formally assessed at the end of each insurance (calendar) year.

If the value of claim liabilities equals the value of assets in the Accident Fund, then the system is balanced but still vulnerable. Changes in the underlying value of investments or liabilities can alter the equation potentially resulting in funding deficits or surpluses. On the liability side, expected claim costs are typically relatively stable but infrequent events can rapidly increase liabilities. Disasters, sudden changes in compensation, and expensive new medical treatments could dramatically increase claim liabilities.

Asset values are also subject to sudden change. The risk of prolonged depressed or falling asset values includes both the loss of capital and expected revenue (interest, dividends, gains on sale) calculated when the valuation was higher. Outflows from an Accident Fund in a falling market may accelerate a decline in the funded status.

To guard against such risks, insurers develop reserves. Reserves provide protection of benefits payable to workers and buffer the need to recover deficits through higher premiums (as well as other purposes as noted below).

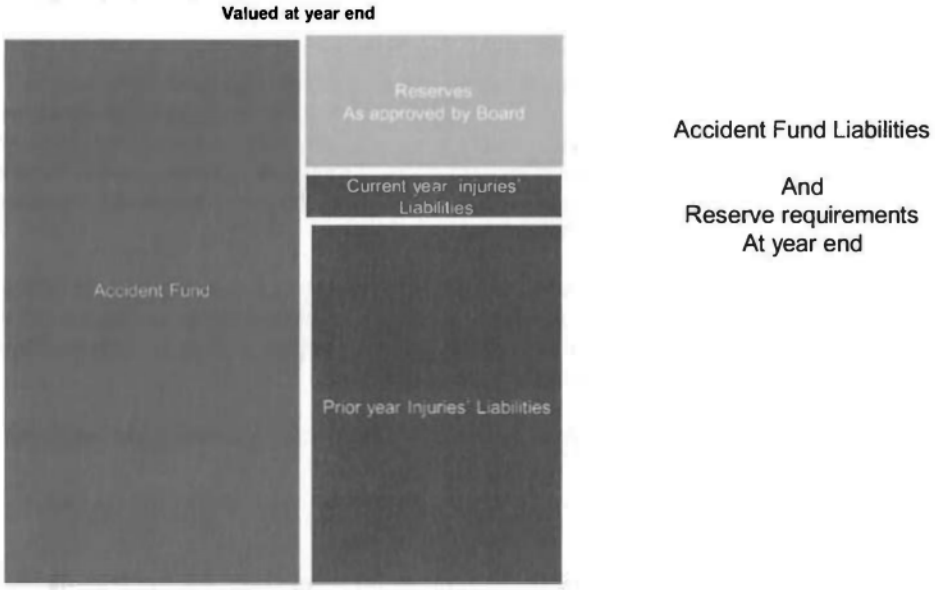


*Figure 9- Accident Fund with Liabilities and Reserves: Representation*

The funded status is determined by comparing the value of the Accident Fund with the value of the liabilities against it. In the strictest sense, if the value of the Accident Fund equals the value of all outstanding charges into the future, the status of the Accident Fund is 100% funded. That does not mean that that the workers' compensation system is sustainable or that that the defined compensation and benefits promised injured workers and their families will be there into the future.

The value of the Accident Fund is highly dependent on the valuation of the investment portfolio portion of the Accident Fund. Holders of investments including mutual funds realize that the value of the investment is a function of what the market is willing to pay for that investment at a particular point in time. That value can change dramatically in a short period of time. In a one-week period during this report, the value of the Accident Fund varied by more than half a billion dollars. Swings the other way are also possible. In the latter weeks of October and early November, the value of assets recovered, nearly reversing the earlier decline in portfolio value.

Other risks are also inherent in the workers' compensation system. In the transfer of financial risk, the insurer takes on responsibilities for work-related injuries and illnesses that have yet to be fully recognized. The work-relatedness of some diseases are yet to be determined but workers in workplaces today may be exposed to the toxins or agents of disease that will generate future claims for compensation, medical

treatment and survivor benefits. (Note: current claim liabilities already take into account recognized long-latency diseases where diagnosis, disability and death may occur 15 to 50 years in the future).

Disasters may also occur on longer time scales. Every employer in the lower mainland faces the risk of an earthquake occurring while workers are in the course of their employment and being injured in the event. Experiences in California and New Zealand provide amply evidence of the risk and inform the estimates of loss that similar events might cause here.

There is also the potential for legislative change (including the options contained in this paper) that impacts prior years' cases. These have the potential of increasing claim costs for claims that occurred in past years.

To protect against these and similar risks, WorkSafeBC and other insurers have several alternatives: charge current and future employers when the risks arise, reinsure for those risks with other insurers, or establish reserves to cover or buffer the impact of such changes.

The first alternative (charge current and future employers for any and all costs that arise in the year) is expedient and simple but has cost consequences. Current employers would be responsible for costs over which they had little or no control. If an earthquake occurs in a given year, then the employers of that year and future years will have to bear the extra costs. If legislative change enhances compensation or benefits for cases already entitled to payment under from the Accident Fund, then the premiums charged employers in future years would have to increase to cover those costs.

Reinsurance options are sometimes used by workers' compensation insurers. A reinsurer may be willing to take on the risk of such events in exchange for a premium. There are few reinsurers in this market and not all are willing to take on these risks. Where they are, the premiums are large and often accompanied by high deductibles. Reinsurance expenses would be borne by current employers.

Many larger insurers, including WorkSafeBC, chose to self-insure these risks by creating and maintaining reserves.

**Key Concepts**

**The current Accident Fund value has accumulated over many previous years; the funding model, investment income, and gains on sale of assets all contributed revenue to the existing Accident Fund**

**The value of the Accident Fund at any point in time is dependent on the value of investments at that time.**

**Liabilities against the Accident Fund are mainly the estimated value required to cover all future payments and administration for all current and prior year claims.**

**Funding Status relates to the value of the Accident Fund compared to Liabilities.**

## Reserves

WorkSafeBC has identified specific risks and established reserves. Special reserves are primarily designed to protect employers from excessive costs arising from work-related claims where they have little or no influence. These include:

- Contingent Reserve - in aid of industries or classes that may become depleted or extinguished

- Disaster Reserve - to meet the loss arising from a disaster (or similar circumstance determined by the Board)
- Enhancement Reserve - for payment of that portion of a disability enhanced by reason of a pre-existing disease, condition, or disability (similar to Second Injury Funds maintained in some jurisdictions)
- Latent Occupational Disease Reserve - relating to occupational diseases not currently recognized as compensable but that may be recognized in the future based on new scientific evidence
- Earthquake Disaster Reserve – to provide for claims from workers who may be injured in the course of their employment during an earthquake disaster

Reserves may be established for purposes other than specific event risks. For example, WorkSafeBC has the following

- Research Reserve – Investment income on this reserve is for initiatives in scientific study and dissemination of information and applying ways to reduce occupational injury, disease, impairment, or disability arising from employment
- Injury Reduction and Return-to-Work Initiatives Reserve - Investment income earned on this reserve is directed to funding projects for piloting and implementing initiatives in workplace injury reduction and disability and injury management
- General Reserve - to provide for special circumstances, including legislative changes that significantly impact the organization's consolidated financial statements and assessment rates levied in a particular year.
- Capital Adequacy Reserve - to mitigate the risks in its assets and liabilities.


Reserves
Established by the Board

Individual reserves have values

- **Contingent Reserve**
- **Disaster Reserve**
- **Enhancement Reserve**
- **Latent Occupational Disease Reserve**
- **Earthquake Disaster Reserve**
- **Research Reserve**
- **Injury Reduction and Return-to-Work Initiatives Reserve**
- **General Reserve**
- **Capital Adequacy Reserve**

*Figure 10- WorkSafeBC Reserves*

By setting aside funds to cover rare events (like disasters), somewhat predictable but uncertain events (like earthquakes), and other risks, insurers can prevent "rate shocks" and level costs over time.

Reserves are generally funded from investment revenues rather than directly from premiums but are notional in that they are not segregated from the Accident Fund. The levels of funding assigned or attributed to each reserve (and reserve levels in total) are decided and managed by the Board of Directors. The largest reserve is the Capital Adequacy Reserve with a value of $2.9 Billion or about 83% of the value of all reserves

**Key Concept**

**Reserves provide stability to employer premium rates and protection of worker benefits.**

## Desired Funding Level

The funded position of the WorkSafeBC is determined by dividing the Accident Fund value by the sum of all liabilities. After several years of analysis, stress testing and modeling of risks, the Board of Directors determined that maintaining a funded position of not less than 130% was in the best interests of the workers' compensation system *at this time*. The level is well above the 100% funded level (where the value of assets equals the value of all liabilities) but deemed necessary to protect the compensation and benefits defined by the legislation. The level also protects present and future employers from the necessity to fund shortfalls in funding as a result of investment performance.

The target funding level is not etched in stone but subject to constant review and adjustment as conditions change if conditions are judged by the Board of Directors require amendment.

**Key Concept**

**The Board of Directors is responsible for determining the value of reserves and desired funding status.**

## Shortfalls and Excess in the Accident Fund

Each year, WorkSafeBC reports the value of its assets and liabilities in "fair value" financial statements in accordance with International Financial Reporting Standards (IFRS) in the *Annual Report and Service Plan* financial statements. The value of the assets and liabilities are assessed independently and subject to audits and review. A perfect balance is rarely achieved.

Imbalances can arise from several sources. The invested assets are subject to market forces; returns may fall short of those needed, expected and planned for. Market volatility alone can result in large swings in the value of the Board's investments (as the example noted earlier of a swing of $750 million in October 2018 illustrates). Prolonged declines in markets can erode the funded position quickly even if revenues and economic activity in the province remain constant in the short run.

The Board of Directors sets its investment policies and expectations to match the longer-term horizon of its liabilities. Markets, however, are never constant. "Bear" and "bull" markets are part of the investment context and can diminish the value of the Accident Fund.

On the liabilities side, the amount of compensation and benefits being paid out may also exceed or fall short of expectations. Changes in patterns of practice and claims filing may also impact on the value of liabilities. The higher profile of post traumatic stress disorder (PTSD), psychological injury, and a greater appreciation of the work-relatedness of certain occupational diseases can change claim volumes and costs.

In a year when the incurred cost of claims exceeds the revenues collected, the loss for that year, (that book of insurance referred to earlier) may be offset by higher revenues from recent years, raising premium rates in

the future, and using reserves to even costs over time. Amortizing larger gains and losses can minimize the impact of these imbalances. When that is no longer reasonable, more drastic action must be taken [See Sidebar Reviews and Reforms].

## Reviews and Reforms: 1988 to 2002. [Sidebar]

In the early 2000s, WorkSafeBC's financial position was poor. Given the outlook and projections, the system was unsustainable and in need of reform. The government of the day introduced changes to the *Workers Compensation Act* consistent with legislative changes made in other Canadian jurisdictions over the preceding decade and the Board of Directors amended policies in an effort to curtail projected operating losses.

Through the 1990's, other workers' compensation systems in Canada and the US faced similar financial difficulty and reforms were urgently enacted in a number of jurisdictions. For several reasons, BC's reforms lagged behind other jurisdictions. In the space of a dozen years, WorkSafeBC transitioned its governance from a commissioner model, to a representative board of governors structure, a panel of administrators and ultimately the present corporate Board of Directors. There was agreement that reforms were necessary but less agreement on exactly what those reforms should take. The Minister at the time, Graham Bruce, noted WorkSafeBC:

*... ran a deficit in 2001 of nearly $287 million.*

*The current forecast calls for an accumulated deficit of more than $900 million by the year 2005. This is due primarily to the system's rapidly increasing costs. If we do not act now, the future of our workers compensation system could be at risk, and benefits for injured workers could be threatened. In recent years Ontario, Saskatchewan, Alberta and Manitoba have been forced by economic realities to renew their systems... "*

Hansard, Thursday, May 16, 2002, Afternoon (Volume 8, Number 3, page 3548)

After outlining the changes, the legislation (Bill 49) would make to worker benefits with particular reference to the new indexing formula, 90% of net compensation limit, and retirement age provisions, the Minister added, "These limits have been set to help return the system to financial health."

The main compensation and benefit changes are summarized in this archival table from an internal presentation:

- New Governance Model: Board of Directors
  *(from Panel of Administrators and former Governor Model)*
- Benefit Changes:
  - 90% net *(from 75% of Gross)*
  - Average earnings rules in legislation based on 12 months and EI included in some cases
    *(from more subjective policy-based methods)*
  - Defined Indexing: CPI-1% once a year, floor 0% cap 4%
    *(from full CPI every 6 months)*
  - 50% integration CPP Disability *(from full stacking)*
  - Pensions to age 65 with Post Retirement Benefit
    *(from pensions for life)*
  - Loss of Earnings "so exceptional test"
    *(from "the greater of the loss of earnings or loss of function)*

The following figure represents the post-reform estimation of the Accident Fund and Liabilities:

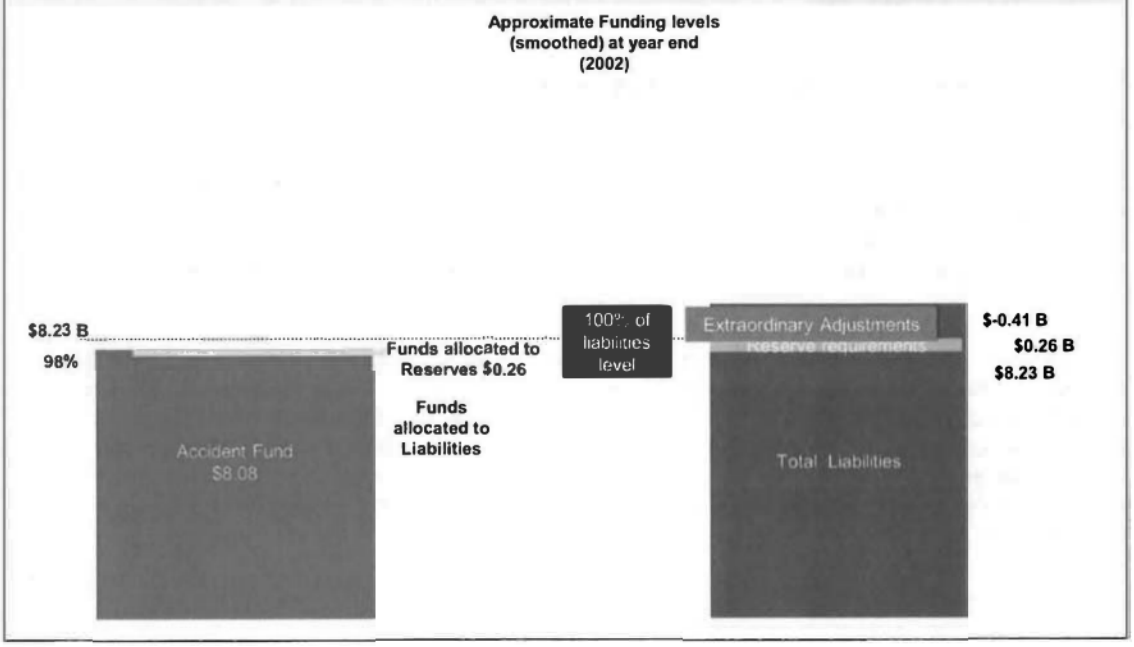


*Figure 11- Accident Fund, Liabilities and Funded Status: Post 2002 Reforms*

The changes had both positive and negative impacts on WorkSafeBC. This table summarizes the impacts as they were estimated in 2002.

| | *Annual Impact* | *One Time Impact (as of 2002 Y/E)* |
|---|---|---|
| 75% gross to 90% net | Saving of $29M | Saving of $48M |
| Average Earning | Cost of $27M | Cost of $83M |
| Life to Term at Age 65 | Saving of $65M | Saving of $31M |
| Full CPI to CPI-1% | Saving of $31M | Saving of $557M |
| **Total** | **Saving of $98M** | **Saving of $553M** |

*Figure 12- Impact of the 2002 (Bill 49) Reforms*

The largest financial impact on the Accident Fund was attributed to the change in the indexation of compensation. The indexation of periodic permanent disability awards (pensions) was previously full indexation applied twice yearly. Under Bill 49 and Bill 37, the indexation was defined as the Consumer Price Index (CPI) less 1% with a maximum of 4% and a floor of 0% (*Act* Section 25). The impact on the Accident Fund was presented as a positive change in position of $465 million. [ Note: 2002 annual report uses $553 million as the impact as it captured impacts from other legislative changes].

The trend and impact of the reforms on the Accident Fund balance of the Bill 49 amendments are apparent in the following archival graphic from an internal briefing:

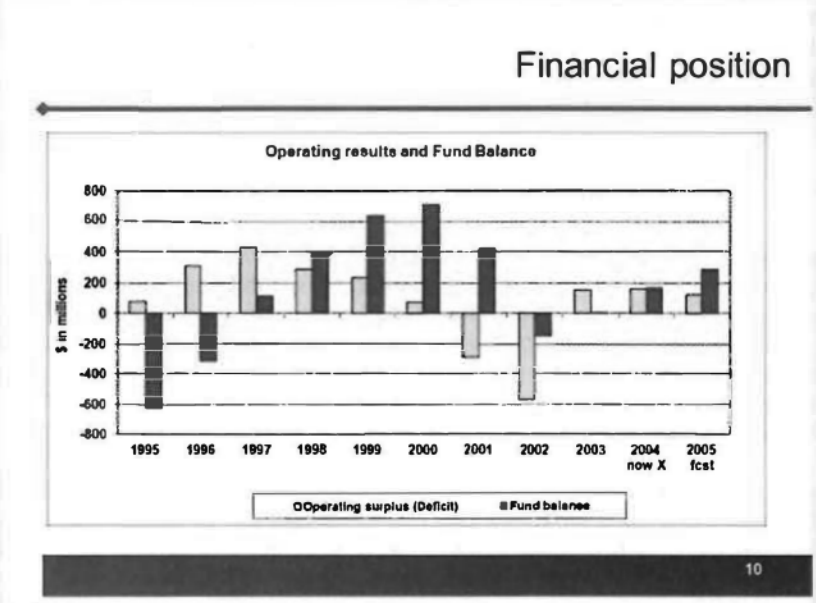


*Figure 13- Operating Results and Funded Balance 1995 - 2005 as estimated 2004*

Note the nearly $1 billion change from operating loss [light blue in Figure 13] from 1997 through 2002 and steep decline in the funded balance [dark blue] leading up to 2002. Post 2002, there was a return to operating surplus and a positive funded position.

Repeated operating deficits and significant unfunded liability positions often result in a tightening of legislative parameters and policy provisions regarding compensation and benefits as well as increases in premiums to employers. The converse is also true. Positive funded positions are often opportunities to improve compensation, benefits and services to workers and to lower premiums for employers.

## Improvements and Adjustments

The main parameters of workers' compensation systems have been in place for a century. While no compensation or benefit structure can overcome the human and financial costs of workplace injury, workers' compensation was initiated to offset some of the financial costs of work-related injuries, diseases and deaths.

According to workers' compensation authority, Arthur Larson:

> The first true compensation act adopted not only in Canada, but in North America and indeed the entire New World, was enacted in British Columbia on June 21, 1902[11]

Although limited in scope and defined compensation and benefits, The Workmen's Compensation Act, 1902 Act (effective May 1, 1903) provided a basis for consideration of the Ontario model proposed in Ontario about a decade later by Sir William Meredith.

The original parameters of Canadian workers' compensation system included:

- Compensation for some of the lost wages for temporary disability
- Compensation for permanent disability
- Benefits in the event of the death of a worker
    - Burial
    - Funeral
    - Survivor and dependents

The BC legislature's approach to implementing a workers' compensation system included a committee of the legislature under Avard Pineo. As a result of his consultations with labour and employer representatives, the BC implementation improved on the Ontario legislation. Prevention and healthcare coverage were not included in the original formulation of workers' compensation but as part of the BC implementation of Meredith's historic compromise, this province had the most comprehensive coverage for medical costs. The inclusion of a comprehensive "medical aid" component in the BC implementation of the Historic Compromise was the price labour demanded for its agreement. One historian put it this way:

> During the B.C. portion of the Committee hearings, employers demanded that workers be responsible for a first aid fund, while employers would take care of the disability fund. B.C. hospitals were particularly prominent during this issue as they claimed that injured workers unable to pay medical expenses was putting considerable pressure on their finances. In a rare act of conciliation at this time, a committee of employers, the B.C. Federation of Labor and the Railway Brotherhoods met privately during the hearings and came to agreement on the medical aid issue. The medical aid fund would receive contributions from workers at a fixed rate, one cent a day, with employers covering the difference if there was a shortfall. Thus workers would be guaranteed immediate and full medical assistance and hospitals and doctors could be assured of prompt payment for services.[12]

BC's medical aid provision was the most comprehensive of its time, although workers' compensation reforms in Canada and the US adopted similar provisions. (Direct worker premiums to support healthcare costs were eliminated in the mid-1940s).

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[11] Larson, Arthur, *Meredith Lectures from 1987-1991*, AWCBC p. 3

[12] Chaklader, A., *History of Workers' Compensation in B.C.: A Report to the Royal Commission on Workers' Compensation in British Columbia*, May 1998, retrieved from October 31, 2018 from http://www.qp.gov.bc.ca/rcwc/research/chaklader.pdf

The Pineo commission put it this way:

> ...[A]dequate medical aid not only results in preventing and alleviating human suffering, and in savings to employers large sums of money otherwise payable in compensation, but also results in preserving and returning to industry the individual efficiency of many of its most competent workmen.

The inclusion of medical aide was not the only improvement proposed for the BC implementation. Pineo added:

> Laws which provide for the taxing of industry to furnish compensation for the victims of industrial accidents irrespective of fault are commendable and desirable, but laws which will prevent the happening of such accidents are of more vital importance[13].

The history of improvements to workers' compensation laws varies by jurisdiction. There are no universal standards or conventions that fully describe the parameters or extent of coverage. One influential US public policy document that has informed policy decisions in workers' compensation laws generally is the *National Commission on State Workmen's' Compensation Laws*[14]. The report established the minimum recommendations for the main compensation and benefit parameters including:

- Maximum weekly benefit at 200% of State Average Weekly Wage.
- Compensation at least 80% of spendable,
- Waiting periods of no more than 3 days and retroactive periods no more than 14 days

The National Commission remains an important policy reference. Most Canadian systems would meet or exceed its recommendations. From the BC perspective, the current maximum weekly benefit would fall short of the recommendation, although the wage distribution in the US in the 1970s may have little relevance to today's wage distribution. The objective of the National Commission recommendations on maximum benefits was to ensure that the highest wage earners were covered. The recommendation on compensation rate of greater than 80% was accompanied by discussion that would ensure compensation payments did not exceed spendable earnings, a possible consequence then as now with using a percentage of gross income as the basis for workers' compensation temporary disability payments.

The coverage, compensation and benefits under workers' compensation laws expanded in the 1980s across North America. Combined with economic conditions at the time, many jurisdictions saw rising employer costs and sought reforms to limit the growth in costs. Most jurisdictions in Canada reformed their compensation systems during the 1990s and early 2000s in ways to control rising costs. For example, many Canadian workers' compensation systems move from a percentage of gross earnings (typically 75%) to a rate that more closely related to "spendable" or net earnings after mandatory income tax and social security (Canada Pension Plan and Employment Insurance). The compensation rate (ranging from 75% -90% of net earnings) was arguably fairer across income categories. It eliminated disparity in as much as workers at all income levels received the same percentage of take-home pay but also reduced the total compensation payable.

Inflation adjustments to compensation were also included. Full indexing of compensation payments was introduced in the 1960s in most jurisdictions but curtailed as inflation levels rose. Ontario introduced the

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[13] Pineo, Avard V., Report of the Committee of Investigation on Workmen's Compensation Laws, (Victoria, BC: King's Printer, 1916), p. 7-9

[14] Burton, John F. Jr. [Chairman], *Report of the National Commission on State Workmen's Compensation Laws*, July 1972 available at http://workerscompresources.com/?page_id=28

Friedland formula (75% of CPI, less 1%, with a floor of no less than 0% and a cap of no more than 4% for those with less than 100% disability), which ended full indexation, in 1994 when the funded status of the Ontario WSIB fell to 37%. As the funded status improved, periodic adjustments were applied. Effective January 2018, full indexation at CPI applies; this coincides with the WSIB reporting in September 2018 that it had eliminated its unfunded liability. Many defined pension plans reformed their indexation policies in the late 1990s and early 2000s. The "cost of living adjustment" moved from a guaranteed benefit to a contingent one, subject to funding sufficiency.

In BC, the economic expansion over time allowed for improvements in the workers' compensation system. For example, compensation rate rose steadily from the original 55% of gross in 1917, 62.5% in 1923 then 66 2/3 % in 1939, to 70% of gross in 1952, then 75% of gross in 1954. The original 1917 workers' compensation legislation included a three working day waiting period with no retroactive period; the retroactive period of 14 days in 1926 and six days in 1946 before being eliminated in 1972

In periods of stability and strong funding levels, workers' compensation systems often initiate measures such as raising survivor benefits, funding occupational health and hygiene education, and investing in research. These improvements are intended to reduce the share of the financial burden workers must bear as a result of work-related injury. They are also responsive to changes in other workers' compensation systems. Historically, increases in the rate of compensation, elimination of waiting periods, and vocational rehabilitation provisions were trends that became part of the workers' compensation comparative environment. The impact any improvement in defined compensation and benefits can be on future costs, past liabilities or both.

**Key Concept**

**Both premium rates and compensation levels are used to manage shortfalls in funding; both premium rates and compensation levels are used to distribute excesses in funding.**

## Current Funded Status

At year-end 2017, WorkSafeBC was in a well funded position. Using elements of the previous discussion, the following chart summarizes the funded status.

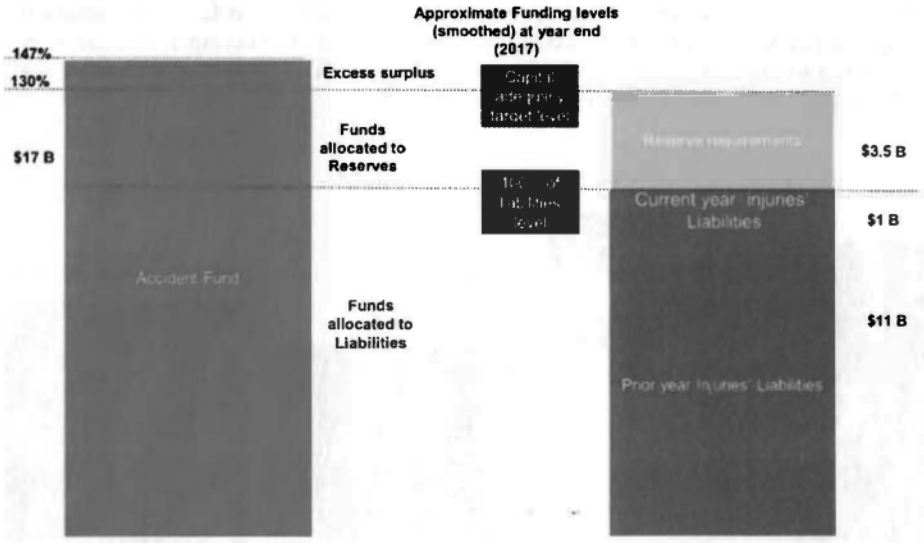


*Figure 14 - Accident Fund, Liabilities and Reserves: Funded Status December 31, 2017*

The values in *Figure 14* are approximate and limited to the year-end valuation of assets and liabilities. The present funded status may vary significantly based on current conditions.

The value of the Accident Fund is a function of the investment strategies approved by the Board of Directors and what the marketplace is willing to pay for the investments at a give point in time. The Capital Adequacy Target established by the Board of Directors provides a benchmark against which the Accident Fund value may be assessed. To the extent that the benchmark set reflects the Board of Directors' assessment of capital adequacy, the value of the Accident Fund can be interpreted as falling short, meeting, or exceeding the target level.

## Capital Adequacy: How much is enough?

The idea of having reserves or saving is familiar advice for personal finances and provides an intuitive analogy for considering the concept of a Capital Adequacy Target. Consumers are often advised to have savings equivalent to three, six, or twelve months of expenses in reserve adequately manage common risks that face individuals and families. The level that is right for any individual will depend a lot on their individual circumstances. Age, location, family responsibilities, and health are all part of the individual calculation of risk to inform the target level for personal savings. The same holds true for workers' compensation insurers. (See Appendix E for the 2016 funding levels of Canadian workers' compensation boards).

The extensive analysis and deliberations that go into setting the Capital Adequacy Target is an essential responsibility of the Board of Directors. A full exploration of that processes is beyond the scope of this explanation, however, the assessment of risks to the Accident Fund has parallels to personal finance example. Significant market swings, geopolitical events, and interest rate changes, changes to fiscal and monetary policies, trade wars, and other risks each have the potential to degrade the value of assets in the Accident Fund. Just like diversification of investments can limit risks for the personal investor, investment policies adopted by the Board of Directors can help mitigate the impact of certain events.

So, how much is enough? That answer will always be contingent on current conditions but testing the current target against past events can help in making that determination. For example, one could ask what the impact of a depression like the 1930-31 or the global financial crisis of 2007-9 would have on the Accident Fund if either event occurred now (see *Figure 15*).

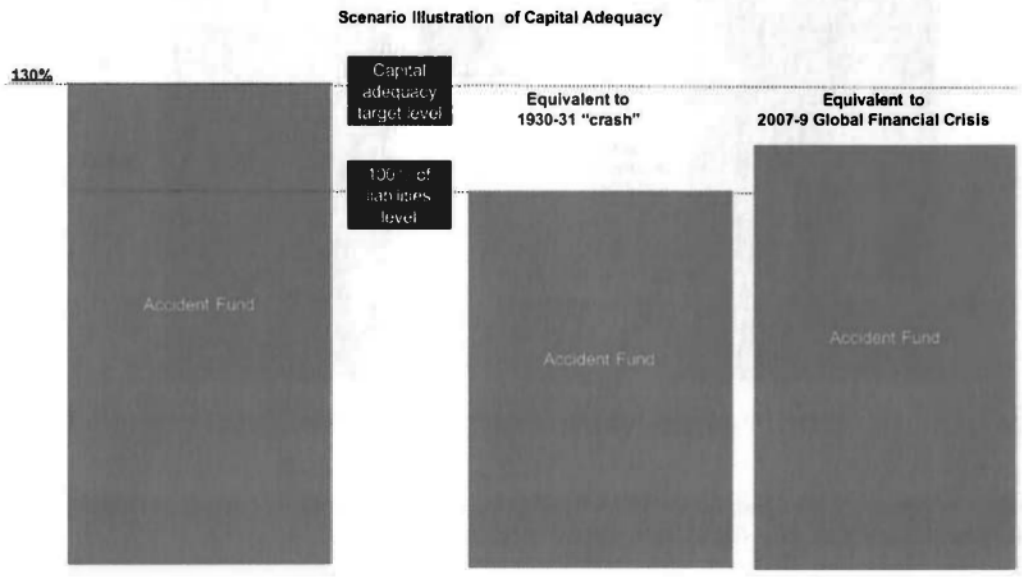


*Figure 15 - Accident Fund: Impact of Adverse Scenarios (based on 2017 funded status)*

If an investment crisis like the one that occurred 1930-1931 were to occur today, the Accident Fund would lose about 30% its value. The global financial crisis that began in 2007 and ended in 2009, had its greatest impact on WorkSafeBC investments in 2008 and Q1 2009 (the 1.25-year period), where losses could be seen. Assuming the current policy asset mix during this time frame, the Accident Fund would have theoretically lost about 15% in 2008 and lost 3% in Q1 2009; the combined cumulative loss over the 1.25-year period would have been about 17%. This is equivalent to about a loss of $3.1 billion, using the October 31, 2018 market value of the Accident Fund.

Changes in the defined compensation and benefits as proposed in the options in this review will increase liabilities and lower the funding level calculations. The down-side risk is that significant adverse events will occur when the funding level is below the target capital adequacy reserve target level and result in a drop in funded status below 100%. The converse is also true; continued increases in the value of the investments underlying the Accident Fund will continue after changes to defined compensation and benefit levels, allowing WorkSafeBC to remain at or near its target funding level.

## The "Right" Funding Level

There is no one correct funding level for workers' compensation insurers. Appendix E provides a snapshot of the recent funding levels of other Canadian workers' compensation boards. While most report funding levels in excess of 100%, each workers' compensation insurer's funding relative to its own target is of more critical importance and one not revealed in comparison charts.

Funding levels as reported at year end are snapshots. Every investor knows that the values of their individual investments and overall portfolio are subject to change. Workers' compensation boards can't manage on the basis of a single measure at a specific point in time. A result higher or lower than the current

target level may not be indicative of an underlying issue. A funding result in excess of or below the target should not trigger automatic changes in premiums, investment strategies or administration.

The Capital Adequacy Target Level is not a static thing. The Board of Directors must continue to assess the economic environment, economic risks, and potential threats to the Accident Fund to establish the appropriate funding level. Changes in defined benefits, market volatility and investment strategy will continue to be part of the background that the Board of Directors must take into account in setting the appropriate funding level.

**Key Concepts**

**The Funded Status represents the degree to which the assets of the Accident Fund are sufficient to cover liabilities from current and all prior years.**

**Funded Reserves allocate amounts for specific purposes.**

**The Capital Adequacy Target level is determined by the Board of Directors as the appropriate Funded Status at a particular point in time and in consideration of current and anticipated economic conditions, risks, threats and opportunities facing the workers' compensation system.**

## Impact of Options on Funding Model and Accident Fund

This review is about options that alter the financial impact of work-related injury, disease and death on workers (and their families), employers, and the broader community. Each option that increases compensation or benefit parameters in the legislation will ultimately impact the Accident Fund and funding model. Any option that will have application to future claims will be reflected in the premium rates for future years. For example, an option that increases the maximum insurable earnings primarily impacts the funding model Several options apply to claims that are already established and continuing in payment. Changing the indexation formula for pensions, for example, increases the claims liability for all prior year claims, effectively raising the asset value the Accident Fund must achieve to be fully funded and meet its Capital Adequacy Reserve Target levels.

# Impacts of Options

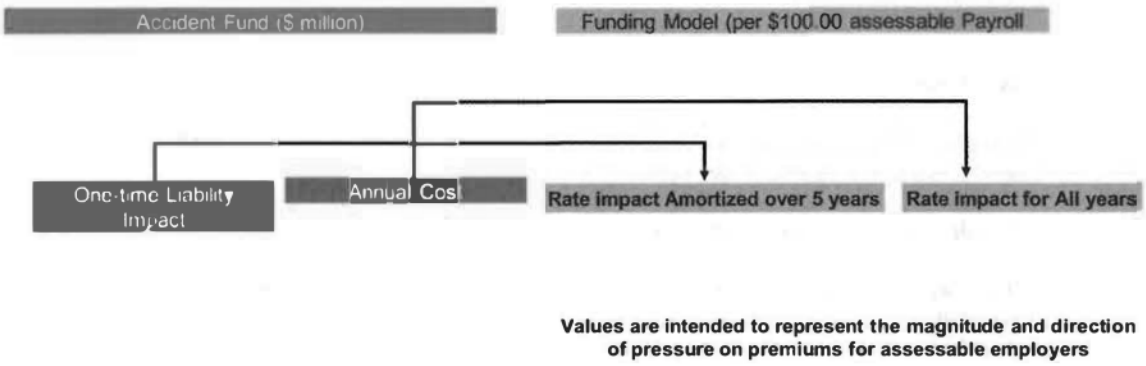


*Figure 16 - Impact of Options: General Representation*

The impact each option will have also depends on the policy and implementation choices the Board of Directors and senior executive of WorkSafeBC will make if the option is incorporated into the *Workers Compensation Act*. Beyond the intent of the options presented here, this paper does not address subsequent policy and implementation choices if an option is enacted. That responsibility rests with the Board of Directors.

Options may also interact. For example, Option 4- providing a one-time cost of living increase to current pension recipients and Option 5- increasing the current cost of living provision (CPI-1%) with essentially full CPI protection going forward, each have their own cost impacts; however, if both are implemented, the overall cost impact will be greater than the sum of the two individual cost impact estimates. Such "interaction effects" must also be considered in assessing the set of options that may be adopted.

The potential impact of the set of options selected for implementation may also be mitigated by transfers from the unallocated surplus or reserves. The upward pressure on premium rates may also be mitigated by offsets from investment gains over the required rate of return. Improvements in primary prevention may reduce frequency and severity of injury while efforts in disability prevention may decrease the duration and other costs associated with claims.

**Key Concept**

**Changes to the defined compensation and benefit parameters of the *Workers Compensation Act* have impacts on the Accident Fund and Funding Model.**

# Part 2

# Views and Perspectives

## Critical Perspectives

Workers' compensation is a common construct in developed economies. Although the social policy choices, system design parameters, and administrative structures vary, there are common themes in the criticisms and perspectives. The scope and timeframe of this report included limited consultation but published research, public briefs and views provided by the stakeholders consulted in this review highlight concerns, views and suggestions. Primary interviews, secondary summaries, and published reports provide a range of views about WorkSafeBC, existing policies and priorities as well as criticisms. While not all of the following pertain to the options cited in this paper, these perspectives inform the discussion and provide insight into issues that may deserve additional attention.

## Administrative arrangement, structure, and mandate

The current structural model of WorkSafeBC was reviewed in the consultations. WorkSafeBC is a statutory agency, operating at arms length from government while responsible through the Minister of Labour. This administrative arrangement was differentiated in comments from alternative state models (Insurance Corporation of British Columbia [ICBC], BC Hydro, Ministry or department of government) and other workers' compensation insurance models (mutualized insurer, competitive state fund). No stakeholders consulted suggested any change to the current model, although some representatives (Canadian Federation of Independent Business - CFIB, Council of Construction Associations - COCA, Independent Contractors and Businesses Association of BC- ICBA, British Columbia Federation of Labour – BCFed,) were concerned that turnover in the Chair, Board Members and Chief Executive could result in swings in direction that would jeopardize WorkSafeBC. While some expressed a tentative belief that the present governance model can be credited with contributing to the current funding status. Sudden changes in key positions were seen as creating uncertainty. There is an acknowledgement that workers' compensation is a complex system; given the time it takes to understand the system, changes in the Board of Directors and Senior Executive are seen as complicating factors in achieving what is in the "best interests" of the workers' compensation system.

Most stakeholders noted the importance of actuarial expertise and expressed confidence in the financial and statistical data provided by WorkSafeBC. The policy consultations conducted were viewed as positive but the employer groups consulted were concerned that this process would not have wider consultation and

greater time to consider and study alternatives. The BCFed noted the slow pace of reforms and action on key issues including the recommendations of the Petrie report[15].

The inclusion of workers' compensation and the OH&S mandate was last reviewed in detail during the Royal Commission on Workers' Compensation in British Columbia[16]. Since then, there have been several reports, none on this aspect of WorkSafeBC's jurisdiction. The recommendation (number 33) of the Royal Commission was that WorkSafeBC retain its responsibilities for the delivery of OH&S programs and services. Subsequent reviews, including the Macatee report[17], considered WorkSafeBC's jurisdiction over OH&S and have not altered that position. Those contacted in this review proposed no alternatives to the present organizational mandate regarding OH&S regulatory or inspectorate functions currently resident in WorkSafeBC's governance and operational structure. The mandate is consistent with the other jurisdictions that share a high proportion of the labour force covered by both workers' compensation and OH&S.

## Funding Level Requirements, Shortfalls, and Excesses

There is an understandable level of uncertainty and confusion over the financial position and policies of WorkSafeBC. This appears to have little to do with transparency of financial statements provided by WorkSafeBC and more to do with the complexity of the accounting, finance and insurance as these apply to workers' compensation. Despite the complexity, there is an appreciation that WorkSafeBC is in a favourable financial position that does allow some adjustments to legislatively defined compensation and benefits. Employer groups consulted expressed grave apprehensions about significant changes government might impose without full appreciation of the consequences. Representatives from CFIB were also concerned that the membership of the Board of Directors did not adequately reflect their members and would not be sensitive to the impact changes in rates or reporting requirements might impose on them. CFIB, COCA, BCBC raised concerns about the greater context for business with changes in other regulatory and reporting requirements coinciding with this review.

All stakeholders acknowledge the uncertainties of markets. When pressed, they generally trust the Board of Directors' decisions regarding the current funding policy; there are differences, however, about how and how soon excess surplus funding should be managed. Here, the views diverge partly by virtue of perspective. BCFed looks back to the changes of the early 2000s. The changes to the legislatively defined compensation and benefit levels are seen by labour as costs to workers. While dollar amounts of compensation pensions were not reduced, the value of pensions awarded have been reduced. They acknowledge that employers had to pay more than the cost rate for a period of time but note that premium rates have been falling and employers have benefited from lower compensation rates that would reflect the real financial cost of injuries for a decade or more. In the interest of equity, they hold that workers ought to have much or all of the lost defined compensation and benefits restored. In addition, they have specific concerns including compensation for contingent workers, delays in decision making, and a lack of independent complaint avenues, lack of an independent medical examination system. Average earnings

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[15] Petrie, Paul, *Restoring the Balance: A Worker-Centred Approach to Workers' Compensation Policy*, April 2018 available at https://www.worksafebc.com/en/resources/about-us/reports/restoring-balance-worker-centered-approach?lang=en

[16] Gill, G. S [Commissioner], *For the Common Good: Final Report of the Royal Commission on Workers' Compensation in British Columbia*, January 1999 available at http://www.qp.gov.bc.ca/rcwc/report.htm

[17] Macatee, G [Special Advisor], *Final Report on the WorkSafeBC Review and Action Plan*, April 2016 available at https://www.worksafebc.com/en/resources/law-policy/reports/final-report-worksafebc-review-action-plan?lang=en

calculations, which became restrictive in the 2002 reforms, were singled out as in need of reform to allow for greater discretion at the adjudicative level.

The employer representatives consulted had a more prospective orientation to their concerns. They acknowledge the present positive financial position of the WorkSafeBC's funded status but note three main concerns. There is medium to low confidence that the economic conditions that favour sectors like construction will continue. They note the cyclical nature of the industry and fear the consequences of increased costs at or beyond the peak of the cycle. The second concern is that decisions will be made on philosophical and political grounds rather than on the basis of evidence and clear cost information. Finally, the broader context facing business was noted as a significant concern. They note that workers' compensation changes that would increase their costs now and, in the future, would be coming at a time when significant other costs and uncertainties are present in their operating environment. Employers mentioned changes to Canada Pension Plan, trade wars, and changing regulatory environments. Changes to workers' compensation cost or coverage would be a further burden.

The representatives from the CFIB sought greater return of funds, preferably in the form of cheques payable to members but acknowledged that the rate offsets provided by the current funding model and policies have helped employers and allowed for greater investment in plant, systems, training and other elements that improve safety. They view any retained excess from investments as funds that should be returned to them, although this was secondary to the goal of predictable, steady rates.

Other employer representatives contacted set stability and predictability as priority goals. Reference to the many uncertainties in recent years were frequently included in consultations. One employer-referenced exhibit noted the value of positive investment returns and adequate reserves (referred to as "cushions"):

> ...[I]nvestment returns (from investing employers' assessment payments) are used to subsidize the rates so that a pattern of good returns will result in lower rates.[emphasis added]
>
> Conversely, years with poor or negative rates of investment returns can trigger the need for sudden and sustained assessment rate increases, unless there is a reasonable "cushion" built into the reserve system.
>
> In the context of these important considerations, the last 10 years have provided instructive examples. WorkSafeBC's funded ratio dropped by 27 per cent during the economic downturn of 2008-2009. A starting point in the 100-110 per cent range at the time would have left the system significantly underfunded at that point and potentially could have necessitated rate increases in response.
>
> The strong funded position at the beginning of the 2008-2009 downturn enabled WorkSafeBC to mitigate rate pressure experienced due to rising claims costs in 2013-2015.
>
> (Dave Baspaly, "An in-depth analysis into WorkSafeBC's financial state, " Journal of Commerce, July 4, 2016)

The adequacy of the reserves was a frequent topic either directly raised by or inferred in the consultations with employer groups. Commonly stated positions included assertions that all the funds were either directly or indirectly employer funds, inferring or claiming any gains ought to accrue to the employers. When presented with alternative models (mutualized insurance, group self-insurance) where there would be more direct support for that position, the present model was seen as preferable.

BC Federation of Labour views noted that the funds paid by employers were for insurance at cost and in lieu of settlements that would otherwise be paid if not for the exclusive remedy created by the Historic Compromise. Their representatives point to the 2002 reforms in particular where changes in the defined compensation and benefits halved the unfunded liability and allowed the Accident Fund to weather the

turbulence of recessions and depressions. They agree with a view of the Accident Fund as a trust holding the present value of promised compensation and benefits.

Employers groups support "tweaking" the defined compensation and benefits framework in the legislation but worry that significant changes would distort the predictability and sustainability of the system. They oppose a return to the pre-2002 provisions and want assurance that any changes will be fully costed and the impact on rates and funding level fully assessed by WorkSafeBC's financial and actuarial professional staff.

## Statutory Compensation and Benefit Provisions

The statutory compensation provisions raised by and with internal and external stakeholders are among those that are presented as options in this review. While the Board of Directors has broad powers to set policy and guide administration on how to apply the legislation, they are constrained from altering the legislative provisions that define compensation and benefits. The following statutory issues were discussed with stakeholders:

1. Statutory maximum insurable and assessable earnings

   The BCFed representatives raised concerns for the compensation of workers at both the maximum and minimum earnings levels. The lack of coverage for workers' earnings above maximum was noted for as unfair and resulting compensation lower than that defined in the legislation. Similarly, lower wage earners were identified as being doubly punished: not having a livable wage in the first place and receiving even less when injured and unable to take measures to make up the difference. There is a stated belief that even with a higher maximum, the present compensation rate does not adequately compensate injured workers. Representative from employer groups were generally in agreement that most workers' earnings should be covered but wanted evidence that this was not the case and expressed concern regarding using other jurisdiction's maximum as a guide. They also expressed concern over the Manitoba and now Alberta models of fixed maximum for assessable earnings and no cap on insurable earnings.

2. Indexation of benefits

   The 2002 legislative changes that imposed the CPI-1% with cap of 4% and a floor of 0% were noted with concern by BCFed. Employer representatives understood the limit but wanted more information on the effect it had on workers. They also wanted to understand the impact of any alternative and expressed a desire that BC not be out of step with others in this regard going forward. There was a firm objection to retroactivity (paying out cash to adjust for past effects of less than full CPI) but acknowledged that some adjustment of current pension amounts might be necessary especially for those with the greatest devaluation of the value of their pension amount.

3. Catastrophic injury cases

   Internal policy and operational specialists, representatives from the BCFed and employer communities confirmed a concern for the most serious cases. Typified by total functional disability on a permanent basis (workers with total blindness, bilateral amputees, para and tetraplegia, certain acquired head injuries), individuals in this category are faced with a severe drop in income at retirement age (termed by one person consulted as the "compensation cliff edge"). Current entitlement to a permanent partial disability award ends and a payment of an annuity benefit is available; access to other funds may be extremely limited. Aside from Old Age Security, payment of other benefits may not be available at all. Some employers'

representatives believed workers should bear some of the responsibility for not putting aside funds during their disability to prepare for retirement but conceded the challenge of doing so in markets with rising housing costs and price inflation when full inflation protections were absent post 2002. BCFed representatives noted the "cliff edge" created with the 2002 change is devastating for these most serious cases who often have no other resources available to them, forcing them to become a burden on social services, charities and family members.

4. Compensation on the death of a worker

All parties interviewed acknowledge that the death of a worker is a thankfully rare but terrible event regardless of age. Several of those consulted noted that some workers may receive no compensation before their death and no expenses related to the claim upon death. Workers with no dependents or survivors will incur little claim cost beyond funeral and burial expenses. The idea that there should be no financial acknowledgement of the death was seen as inconsistent with the values of society in general and WorkSafeBC in particular. There was little objection to recognizing the death of a worker through some financial compensation payable to the estate, although the impact of such a payment on estate status was raised as a concern. The cost was not seen as significant given the relatively low numbers of fatalities recognized every year but any change considered should be fully assessed for its potential impact on compensation rates.

A related issue was the ability to provide standing in claims matters granting standing to the estate of a worker in certain cases. Several sources consulted explained unique situations where a worker, with no children or spouse, may not be able to apply for compensation following injury or occupational disease; following the death of the worker, the executor or executrix at present has no standing to file a claim.

A third issue in this regard was raised with respect to Personal Optional Protection. It was noted by several stakeholders that this is a growing segment in the gig economy and that the present process for covering workers for work-related death is problematic. At present, the benefits payable to workers under POP are limited to declared earnings. The process for covering workers in this category often lead to minimum earnings being declared simply as the path of least resistance to becoming registered so they may begin work where WorkSafeBC coverage is required. Upon death, survivors and dependents may receive amounts based on declared earnings.

Similarly, young workers, new workers, contingent workers, marginal workers, students working part time and others were noted in discussions as having little in the way of earnings. With few exceptions, the actual or minimum earnings are used. Both labour and employer representatives agreed that the current provisions for compensation and benefits following the death of a worker in these situations—particularly those with ten or more years to work—may well undercompensate for the loss. Various ways to address this were raised and seen as reasonable and even desirable, and likely not costly given the low number of cases represented in this population. Employer representatives were, however, concerned that the impact on rates be fully examined and accounted for before any change was adopted.

5. Retirement age termination of benefits and elimination of lifetime pensions.

Prior to the 2002 reforms, permanent partial and total disability was compensated through a lifetime award. The 2002 reforms introduced a retirement age and annuity payable upon retirement. The former approach conceptualized the loss due to injury as a lifetime impact while the reforms narrowed that consideration to an economic impact during working life. Those who view workers' compensation for permanent disability as a substitute for tort point

to the awards made by the courts in personal injury cases resulting in disability where the value of the award typically considers lifetime impacts.

Workers' compensation jurisdictions have taken a variety of approaches in compensation for permanent partial and total disability—an indication of the complexity and competing views of what workers' compensation insurance ought to be. There are two predominant ways of assessing the long-term impact of injuries. The first is "impairment", a measure of permanent loss of physical or psychological functioning typically measured in terms of a percentage loss on a "whole body" basis. This approach typically involves the use of schedules or guides such as the *AMA Guides to the Evaluation of Permanent Impairment*. Schedules prescribe the percentage impairment of impairment; non-scheduled impairments are assessed according to guides or rules to come up with a percentage impairment that may then be used in determining entitlement either directly (by applying the percentage of impairment to pre-injury earnings or to a specified dollar amount) or as an input to a formula that results in a value of the award. BC's legislation uses the term "impairment of earning capacity". This is not the same as physical or psychological impairment, the basis for most US and Canadian impairment rating schedules and guides.

The disability approach often uses similar terms. Schedules that assess values to the loss of function are used directly to determine disability-the presumed economic earning capacity impact resulting from the injury.

In practice, both approaches have schedules that allow for a measure of impairment or function to be assessed and result in a means that will allow the loss to be translated into a value to be paid the worker. In jurisdictions that use the impairment approach, an assessment of non-economic loss may result in the payment of a lump sum or periodic payment for life independent of the impact of the injury on earnings or earning capacity. Many jurisdictions with non-economic awards also allow for the payment of economic loss or earnings loss in addition to the non-economic award.

In Canada, most jurisdictions (other than BC and NWT/NU) provide a lump sum award for the non-economic effects of a permanent physical impairment and then consider a loss of earnings award or economic loss award to a retirement age, typically 65. In the US, most jurisdictions are impairment based but many use a combination of methods to arrive at dollar amounts that reflect the loss. According to one analysis[18], thirteen states use a loss of wage-earning capacity approach, estimating financial impact of the injury on factors such as education, age and labour market conditions in addition to impairment. Another ten states use pre- vs. post- injury wages assessed at some point after return to work. Eight states were reported as using a "bifurcated" approach similar to the BC approach prior to the 2002 reforms, using the impairment or disability rating to determine loss in cases where the worker returned to work at or near pre-injury earnings, and an assessment of future earning capacity for others.

Prior to the 2002 reforms, the permanent disability award for loss of function was applicable for life. The legislation also provided for an individual evaluation of the impact earning capacity; the worker was granted the greater of the loss of earnings or the loss of function. The 2002 reforms imposed a retirement age and restricted the application of this "dual" approach to exceptional cases.

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[18] Workers' Compensation Research Group, *Comparison of State Workers' Compensation Systems, Texas Department of Insurance*, March 2004

Rolling back the provisions of the 2002 reforms has been a consistent message from labour; a return to pensions for life of the worker was raised as an issue in the consultation. Some consulted note that there appear to be more older workers and the limits of two years compensation seem arbitrary and unfair given the reality of the workplace. They also note that the policy allows for a later age than 65 in certain circumstances. In fact, internal resources noted that retirement age entered when pensions are established are often greater than age 65.

The Royal Commission on Workers' Compensation in British Columbia considered the issue of a presumed retirement at age 65. The three-member commission split on the issue with the labour commissioner, Gerry Stoney, dissenting:

> Therefore, the commission recommends that:
> 154. the Workers Compensation Act be amended such that:
> a) in cases of permanent disability, loss of earnings awards shall:
> i) cease upon the worker retiring, or attaining the age at which the worker would have retired but for the injury or disease and,
> ii) be replaced thereafter with loss of retirement benefits for the lifetime of the worker;
> **(Dissent: Commissioner G. Stoney);**
> b) loss of retirement benefits are calculated by multiplying two percent of the worker's loss of earnings benefit by the number of years during which the benefit was received, up to a maximum of 35 years; and
> c) unless the contrary is shown, it shall be presumed that the worker would have retired but for the injury or disease on reaching the age of 65.

The 1999 Royal Commission report was not acted upon but the issue was again addressed in the Core Review by Alan Winter in 2002[19]. Winters noted the Royal Commission recommendation and considered the approaches in other provinces, preferring the Manitoba and Ontario models that limited periodic payments to age 65 and provided for an annuity at age 65 as a post-retirement income. This became the basis for the 2002 reforms. The limitation to a retirement age has the impact of reducing claim liabilities for future cases. Subsequent consultations and changes to WorkSafeBC's Permanent *Disability Evaluation Schedule* have adjusted the values of disability[20].

None of the consulted parties raised a desire to revisit the basis of permanent disability evaluation, although several parties raised concerns over the retirement age and adequacy of awards in certain cases, particularly those with catastrophic injury. One person noted the contradiction of a "permanent" partial disability award that terminates at an arbitrary age, suggesting the name should be changed to reflect the impermanence of the award.

As noted earlier, internal consultations confirm that there is an increasing use of a later age being entered into the pension system. Policy input notes that current requirements for workers—even those in their teens and twenties—to declare their future retirement plans is unlikely to fairly represent the situation. One stakeholder pointed out that in the 1970s, she and many others believed everyone was aiming for retirement at or before age 55 but the

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[19] Winter, Allan, Core Services Review of the Workers' Compensation Board, March 2002 available at https://www.wcat.bc.ca/research/WorkSafeBC/WSBC_Hist_Rpt/2002%20Winter%20Report%20(Complete)%20.pdf

[20] WorkSafeBC, Permanent Disability Evaluation Schedule ("PDES") Discussion Paper, December 2012 available at https://www.worksafebc.com/en/resources/law-policy/discussion-papers/consultation-permanent-disability-evaluation-schedule-pdes/consultation-permanent-disability-evaluation-schedule-pdes?lang=en

*(footnote continued)*

reality of today is that many are working well beyond that age. The current policy is not reflective of the current reality.

### Meredith on the Burden of Permanent Disability[21] – [ Sidebar]

*In order that it may be seen whether the division of the burden between the employer and workman is unfair, it may be well to point out how it will be divided under the provisions of the proposed law. The workman will bear (1) the loss of all his wages for seven days if his disability does not last longer than that, (2) the pain and suffering consequent upon his injury, (3) his outlay for medical or surgical treatment, nursing and other necessaries, (4) the loss of 45 per cent of his wages while his disability lasts; and if his injury results in his being maimed or disfigured he must go through life bearing that burden also, while all that the employer will bear will be the payment of 55 per cent of the injured workman's wages while the disability lasts.*

*The burden of which the workman is required to bear he cannot shift upon the shoulders of any one else, but the employer may and no doubt will shift his burden upon the shoulders of the community, or if he has any difficulty in doing that will by reducing the wages of his workmen compel them to bear part of it.*

*It is contended that it is unfair to require the employer to pay compensation during the lifetime of the workman because in many cases it will mean that the workman will receive compensation for a period during which if he had not been injured he would have been unable to earn wages. No doubt that will be the result in some cases, but on the other hand the workman loses any advantage he would have derived had he not been injured from an increase in his wages owing to an improvement in his position, or to an increase of his earning power, or to a rise in wages from any other cause because, except in the one case of a workman who is under the age of twenty-one years when injured, the compensation is based on the wages the workman was earning at the time of his injury.*

6. Authority for diagnostic and prophylactic treatment prior to acceptance

Several situations were raised with internal staff where the access to treatment post injury is critical but the decision to accept or deny the claim may be delayed by the need for investigation. Three situations were noted contrasting the policies and practices. The first was a needle-stick injury with a possibly contaminated HIV needle. The needle stick injury is deemed an injury so prophylactic treatment can begin and the case monitored. Cedar dust asthma was also noted. The acute nature of the reaction is very brief but may mean the worker must leave the job even though they are not disabled.

The relatively new area of mental injuries was also raised. WorkSafeBC does provide some critical incidence response including some access to treatment as an administrative expense.

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[21] Meredith, William R. [Commissioner], *Final Report on Laws relating to the liability of employers to make compensation to their employees for injuries received in the course of their employment which are in force in other countries, and as to how far such laws are found to work satisfactorily*, 1913 available at https://www.wcat.bc.ca/research/WorkSafeBC/WSBC_Hist_Rpt/1913%20Meredith%20Report%20(Complete).pdf

The goal is to avoid serious repercussions from the incident but some cases to convert to claims at which time the previous costs are charged to the claim. It should be noted that employers acknowledged the work-relatedness of mental injuries but worry about the expansion of coverage in this regard, pointing to the cost issues apparent in some Australian jurisdictions.

7. Growing employment in the excluded sector and lowest income workers.

Several stakeholders noted that workers in the "gig" economy and contingent workforce are becoming more prevalent—a trend that runs counter to the "universal" coverage intent of the legislation. Firms will contract with individuals for specific, short term contracts. These individuals may be working as consultants or contractors and may or may not have workers' compensation coverage. The nature of their work lacks the protections that are typical of direct employment. For them, there may be no coverage under workers' compensation but even if they have coverage, their overall benefit framework will be limited. It is unlikely that they will have a defined benefit or defined contribution retirement plan, disability insurance or other typical employer-based support. If this sector grows, there are implications for broader society including the healthcare system because employment in excluded or optional sectors is covered by the public health system rather than workers' compensation. This sort of externalization also means the information recorded on work-place risks and injuries will be incomplete.

8. Other concerns

The following items were noted or discussed in consultation but were not included in the options developed for this report. These have not been fully analysed at this time for this report because most are difficult to model for cost impacts on the Accident Fund. They are included here to illustrate some of the more significant issues that are not addressed in this report. While many of the items were presented as requiring legislative change, some may be addressed through policy or practice.

Interest policy - BCFed and some employer representatives noted that the payment of interest for delayed decisions is a common expectation and justifiable when there is excessive delay or decisions resulting in large retroactive payments. The present policy regarding interest was seen as overly restrictive and noted that the interest cost would incentivize better decision-making and training of adjudicative staff.

Integration of CPP Disability- The former "stacking" of CPP disability on claims rather than the 50% integration for disability awards was raised by BCFed. They would like to see a return to the stacking option.

Average earnings - BCFed representatives suggest a return to the provisions prior to 2002. Employer representatives generally supported the 2002 changes that provided greater guidance on the calculation of such earnings. They felt the reliance on "T4" -like information was too onerous and would prefer greater discretion.

Powers of the Board of Directors/ Status of Policy- Part of the reforms in the early 2000s was to decrease the discretion of adjudicators and to increase the status of the policy of the Board of Directors to that of subordinate legislation rather than the intended guidance. This issue was also raised in the Petrie Report. Employer groups consulted generally supported the requirement of adjudicators and WCAT to apply the policy of the Board of Directors. Some recalled the concerns that gave rise these provisions. BCFed representatives would prefer greater discretion be granted decision makers.

Reconsiderations- BCFed recommended changes to the "no re-consideration after 75 days" provision so WorkSafeBC may reconsider its own decisions. They see the provision as problematic and giving rise to a whole series of questions about the nature of a decision and resulting in fragmentation of decision-making and injustices. One employer representative raised this issue but noted that the system cannot always make perfect decisions and believed the perceived possible "rough justice" was preferable to the alternative of decision-making not reaching a point of finality. Several subject matter experts and advocates suggested that some form of reconsideration or similar provision should be open to particularly seriously injured young workers with respect to retirement age. They argued that "locking in" a retirement age for these workers as the time the permanent disability award is established fails to reflect changes in retirement patterns over the long term.

Efficiency - Employer representatives were concerned that cases take too long to be decided and workers compensated. BCFed similarly noted the long delays in many decisions and the financial stress lengthy delays place on workers.

Claim Suppression- BCFed representatives noted that the working of section 177 of the *Act* does not include any remedy if an employer was found to engage in claim suppression. They recommended the *Act* amended to include a provision for enforcement and even collection by WorkSafeBC.

Code of Conduct- BCFed representatives raised the Alberta legislation's inclusion of a code of conduct (*Workers' Compensation Act*, RSA 2000, Chapter w-15, Section 9.2(1) ) recommending a similar inclusion in the BC legislation.

Fair Practices Office - BCFed recommended legislative change to make this office independent (external to WorkSafeBC).

Medical Disputes - BCFed representatives suggested the creation of an independent medical panel office to conduct Independent Medical Exams (IMEs) and resolve medical disputes.

There was some acknowledgment by employer groups of efforts by the Policy Department of WorkSafeBC reaching out to them. Efforts to partner were seen as positive but often blind to the overall environment where other agencies are imposing changes or seeking input at the same time, stretching their resources and challenging the capacity of their members.

Many issues were raised that fall into the "policy" purview of the Board of Directors or actionable with existing legislative provisions in the *Act* or other legislation. These relate to the application of the existing law with respect to certain provisions including:

- So exceptional test for loss of earnings
- Level of expenditure on prevention initiatives
- Lack of prosecutions or stepped up compliance
- Mandatory reinstatement

## Other criticisms

Experience Rating was raised in the consultations. Despite the fact that this is within the purview of the Board of Directors, it is important to note its significance in commentary and critiques of the *status quo*.

Former chairman of the Workers' Compensation Board of BC, the late Terence Ison, has written about this concern—a concern that is echoed in more recent commentary and discourse.

Ison's primary criticism of the present model:

> For many years, the assessments paid by employers have been adjusted substantially by the costs of claims made for the disabilities and deaths of their workers. These adjustments are called "Experience Rating". This is a dominant cause of the unfortunate changes made to WC in Canada, and damaging changes that continue being made.[22]

Ison asserts that Experience Rating Assessments (ERA) drives employer behaviour including appeals against claim acceptance and other decisions in favour of workers that could adversely impact ERA. He suggests that ERA spawned an industry of "Employer Representatives" who may be paid a proportion of what they reduce an employer's premiums even though their actions may actually increase the costs of the system overall.

Ison and others suggest that ERA drives claim suppression and may result in workers being urged to return to work earlier than medically advisable.

Ison recommends abolishing ERA. Other informed critics suggest ERA is salvageable.

Harry Arthurs examined Ontario's workers' compensation funding system and recommended WSIB retain ERA if it met three specific criteria[23]. Arthur's recommendation (6-1 in his report) is about the intent of the program: to encourage employers to reduce injuries and occupational diseases, and encourage workers' return-to-work and conclude "that the [experience rating] programs are in fact accomplishing that purpose", at least in Ontario. He also advocated for close, credible monitoring to limit "gaming" the ERA system to prevent adverse consequences to the system in general and workers in particular.

Unfortunately, there are few worker outcome studies on which to base this conclusion. WCRI has released a series of outcome studies for more than a dozen US states. Through a rigorous design and direct interviews with large stratified and comparable samples of workers, the study provides key insights into outcomes, although linkage to policies like the aggressive nature of ERA, compensation or vocational rehabilitation policies are not explored in the series to date.

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[22] Ison, T, "Reflections on Workers' Compensation and Occupational Health & Safety" (2013) 26 *C.J.A.L.P.* 1-22

[23] Arthurs, H, *Funding Fairness: A Report On Ontario's Workplace Safety And Insurance System*, Queen's Printer Ontario, 2012 available at http://www.wsib.on.ca/cs/idcplg?IdcService=GET_FILE&dDocName=WSIB011358&RevisionSelectionMethod=LatestReleased
*(footnote continued)*

The RAND Corporation recently released a descriptive study concerning workers' compensation and occupational safety and health.[24] That study summarizes a wide cross-section of views and concerns into the following themes, some of which are common across most workers' compensation systems. These concerns and priorities for action include the following [extracted from the report]:

- Coverage remains less than universal, and benefit adequacy is insufficient.
- Safety promotion practices have been somewhat successful but create complex claiming incentives.
- System complexity is a drag on performance. Complexity, delays, and excessive disputes within workers' compensation systems have been widely criticized as a factor that raises system costs and that can harm injured workers by creating an adversarial relationship with employers or preventing timely receipt of needed medical care and rehabilitation services.
- Stakeholders identified many shortcomings of workers' compensation policy as important challenges to worker outcomes
- New approaches to injury prevention and disability management are needed
- Declining coverage of workers and health conditions prevents workers' compensation from serving its purposes
- Inefficient claim management and dispute resolution processes harm workers and drive up costs
- Health care for injured workers is often fragmented and of low quality and is not designed to reward worker outcomes
- Scientific evidence on causation is badly needed to guide workers' compensation systems in handling occupational disease and pre-existing conditions

These views are useful in informing policy actions and selection of options. For the purposes of this study, ERA and research matters are out of scope.

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[24] Dworsky, Michael and Nicholas Broten, *How Can Workers' Compensation Systems Promote Occupational Safety and Health? Stakeholder Views on Policy and Research Priorities*. Santa Monica, CA: RAND Corporation, 2018.

# Part 3

# Options

## Options

The following options represent legislative changes that will address many stakeholder concerns and allow the Board of Director to more effectively act in the best interests of the workers' compensation system. In particular, the options beyond the *status quo* provide changes to the defined compensation and benefit provisions that will restore the value of previously awarded pensions in the past, revise a cost of living provision for all claims going forward, increase the "age 65" provision, establish a new maximum assessable/insurable earnings provision, and improve benefits paid on the death of a worker.

The financial impact of options 2 through 7 were generated by WorkSafeBC's internal resources using their extensive dataset and modeling techniques. The dollar value impact on premiums for assessable employers is based on current policies and practices. The Board of Directors may alter these policies and practices should some or all of the options be selected for implementation. For example, the Board of Directors may extend or accelerate the amortization impact or implement policies that will mediate the application and dollar impact of new provisions.

Each option, beyond the *status quo*, has an impact on the funding model or the existing Accident Fund or both. Each of these options may be pursued individually but collectively will help achieve the balance, sustainability, and improvement stakeholders seek and administration representatives believe are in the best interests of the workers' compensation system. An interaction effect impact for the full set of costed options 2 through 7 has been developed and included. This particular estimate applies to this set of options; any other set or subset will likely have a different interaction impact.

## Option 1: The *Status Quo*

**Description**: Current defined compensation and benefits in the legislation to remain as they are.

**Rationale**: There is ample evidence that the current compensation and benefit structure with policy and administration under the Board of Directors has achieved the objectives of the 2002 reforms. The parameters of the wage-loss and permanent disability provisions continue to meet and exceed those provided in other jurisdictions for most workers.

The powers and responsibilities of the Board of Directors have proven equal to the task of managing the Accident Fund in the best interests of the province and achieving the current funding level. The strong financial position achieved under the *status quo* has allowed the Board of Directors to use the policy and administrative levers to enact changes in the best interests of the system. A strong financial position has allowed the Board of Directors to:

- Increase staff dedicated to Occupational Health and Safety
- Increase vocational rehabilitation services
- Invest in research
- Improve outreach to specific sectors
- Promote prevention

Continuing under the *status quo* does not necessarily mean a static system. Under successive leadership of members of the Board of Directors, CEOs and senior executives, WorkSafeBC has demonstrated its ability to respond to change and crisis. This is particularly evident in the relatively smooth transition through the global financial crisis. The *status quo* option allows the board to change existing policies to respond to specific concerns.

The current state of financial markets also supports the *status quo*. The volatility that has marked the post-depression era continues. Extended interventions of central banks using interest and other monetary policy levers may have supported the longest bull run in history but the tightening fiscal policy marked by increasing prime rates have given some a reason to call for caution. While the new United States-Mexico-Canada Trade Agreement has removed some unknowns, other threats from trade wars and increasing sentiments away from globalization support going forward with caution.

**Implications for the Accident Fund**: The current methods to spend funds, increase/create/collapse reserves and support premiums below the required cost rate remain open to the Board of Directors under this option. While the future of markets can never be known with certainty, retention of gains and increasing the funding level allow the Board of Directors to protect and preserve its funded status for the benefit of the workers' compensation system.

**Other implications**: This option means legislative provisions remain as they are. BC's position on indexation of benefits has not kept up with leading workers' compensation systems and cannot change in this option. The formula for increasing insurable earnings is not reflective of the distribution of earners in BC but will remain under this option. Differences and disparities between BC and other leading workers' compensation systems may erode confidence in the system.

## Option 2: Increase the Statutory Maximum to cover all earnings for 90% of workers

**Description**: Revise the formula for determining the maximum insurable and assessable earnings such that at least 90% of BC workers are covered for 100% of their earnings from employment. This will restore BC to a level at or near most neighbouring and comparator jurisdictions.

An increasing proportion of earners are earning above the current maximum of $82,700 per year. BC's maximum insurable earnings are now well below Ontario at $90,300. Alberta's maximum insurable and assessable earnings level was at $98,700 until recent legislative changes eliminated the cap on maximum insurable earnings but retained the present maximum on assessable earnings. Until September of this year, Alberta had a stated objective of covering 100% of earnings for 90% of workers in that province. Alberta joins Manitoba in eliminating the maximum insurable (although it retains a maximum $127,000 assessable earnings limit in that province).

**Rationale**: The original intent of Meredith's workers' compensation was to cover the highest wage earners but not necessarily the earners of the highest paid managers.

That said, there is clear evidence that the disparity between the highest and lowest wage earners has expanded in recent decades. High demand for high skilled occupations has driven earnings higher for this segment of the population. Many in high tech, medical, education, engineering, and some construction trades have annual earnings in excess of the current maximum. Marine employers note that some dock workers earn more than $250K in some years (and raised concern about the absence of a cap contributing to lower incentives for returning to work).

Using Canada Revenue Agency data from personal income tax filings for taxation year 2015, it is possible to compare the maximum insurable earnings of that year to the distribution of tax filers reporting earnings from employment on Line 4 of their personal returns.

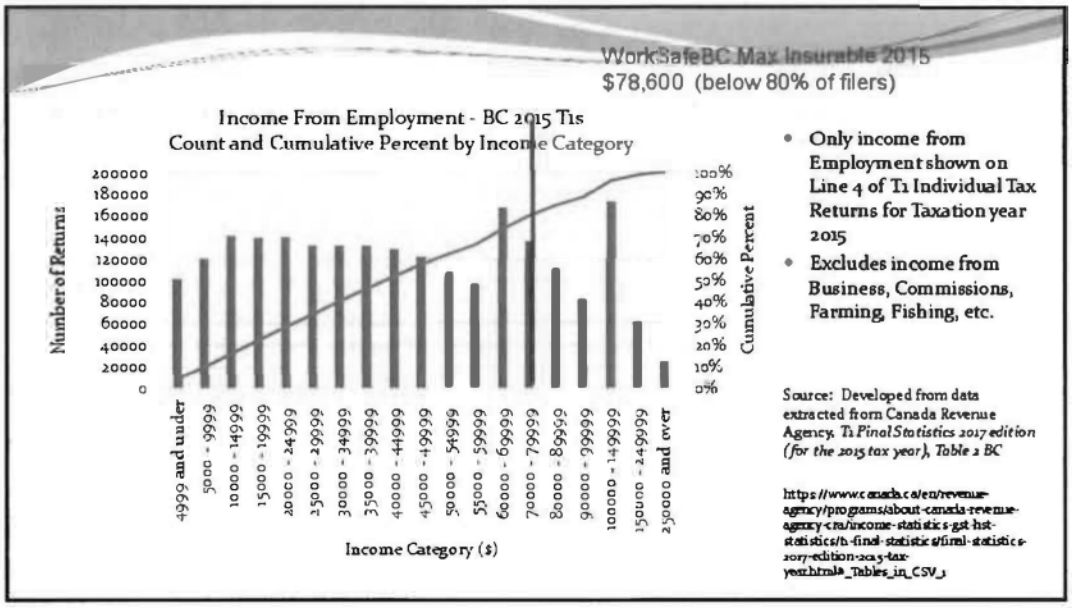


*Figure 17 – Count of T1 2015 Tax Fillers by Income Category: Line 4 Employment Income*

Limitations of this analysis are many and are likely to understate the extent of the issue. This analysis excludes earnings from employment that may be insurable or covered for workers' compensation purposes. Commissions, other employment income, professional income, self-employed income are reported on other lines on personal income tax forms. Using just line 4 data, more than 20% of earners were in categories above the WorkSafeBC maximum for that year. Adopting $100k maximum insurable and assessable would increase the coverage of full earnings from employment (Line 4 of the *T1 Income Tax and Benefit Return*) to approximately 88.5% of tax return filers in the 2015 dataset.

The elimination of the maximum is a departure from the original intent of workers' compensation as proposed in the Meredith model, although it is a perfectly legitimate choice from a public policy perspective to extend the maximum to cover all earnings of all earners. Two provinces (Alberta and Manitoba) have taken that step. It is not clear how eliminating the cap on insurable earnings would have on rate making, service provision or behaviour. There are no published studies on the impact of limiting assessable payroll but covering all earnings above that level. The lack of research into the impact eliminating the maximum cap on insurable earnings is the primary reason for retaining a maximum figure at this time. Further consideration of elimination of the maximum insurable should await research in this area.

**Comparator Data: BC's current maximum insurable earnings and assessable earnings at $82,700 (2018) moving to $84,800 (2019).** Alberta has established a maximum assessable at $98,700 but eliminated its cap on insurable earnings. Its previously stated policy was to cover 90% of the workforce for 100% of their wages[25]. Manitoba has set its maximum assessable earnings at $127,000 but eliminated its cap on maximum insurable earnings.

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[25] WCB Alberta, "Changes to Maximum Insurable Earnings", *Employer Fact Sheet*, June 28, 2018 • WCB-588 available at https://www.wcb.ab.ca/assets/pdfs/employers/EFS_Changes_to_Maximum_Insurable_Earnings.pdf

Saskatchewan has maximum insurable earnings set at $82,627 (2018). Ontario currently has maximum insurable earnings set at $90,300 (2018) and increasing to $92,600 (2019).

The elimination of the maximum insurable in Alberta and Manitoba effectively eliminates the need for government to set a formula or adjust the maximum. In Saskatchewan, the maximum setting is delegated to its Board of Directors.

Washington state assesses employers on hours of exposure rather than payroll for most categories. Their compensation rate pays 60% to 75% of gross depending on family composition and there is a maximum benefit. In US dollar terms, the maximum insurable earnings may be inferred to be between $90,000 and $112,580.

**Legislative amendment**: Set the statutory maximum insurable and assessable earnings equal to $100,000 per annum and delegate to the Board of Directors the authority to set the maximum insurable earnings and assessable earnings to a level such that 100% of earnings will be insured for at least 90% of workers in the province.

**Sections of the Act:** Section 33

**Implications for the Accident Fund and Funding Model:** This is a prospective option and primarily impacts cases in the future. There will be some impact on past cases where a new wage rate for compensation purpose must be established and cases that arising from past or current year claims after the wage rate is set. Ignoring the drop in the rate due to larger assessable payroll, the impact on premium rates will be in the order of $0.02-$0.03 per $100.00 of payroll. The one-time impact on claim liabilities will be an increase of approximately $31 million.

# (2) Impacts of Statutory Maximum Assessable and Insurable to $100k

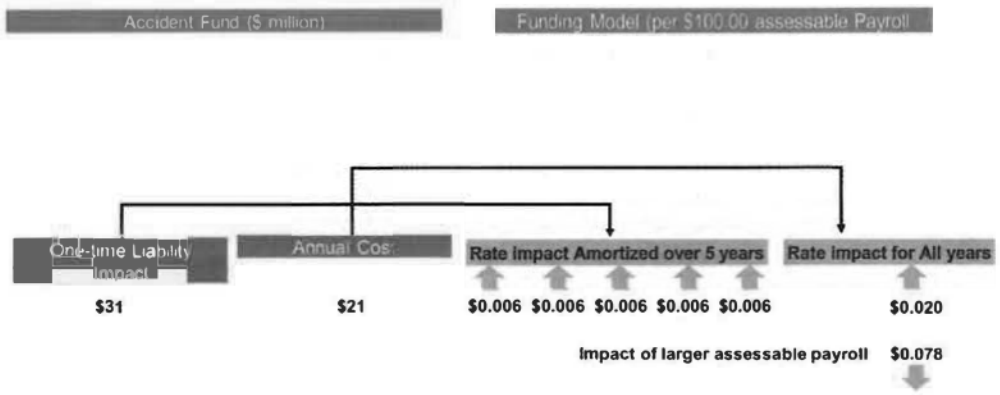


*Figure 18 - Impact of Option 2: Statutory Maximum Assessable and Insurable to $100k*

## Option 3: Increase presumed retirement age to 70

**Description**: This option would be achieved by changing all references in the legislation from age 65 to 70 (and age 63 to 68). Assume the change were effective upon passage of the legislation and would apply to all cases currently in receipt of pensions where the worker is under age 65 at the effective date and all current and future claims where the worker is under age 65.

**Rationale**: The 2002 legislative reform moved away from full life pensions to permanent disability compensation coverage that ends at the presumed retirement age 65. . The reform also limited benefits to **two years** for those 63 years of age or older. The actual retirement year could be set at an age beyond age 65 if a later retirement date was supported.

This option does not fundamentally change the intent of the of the 2002 reform but it recognizes the societal and demographic changes that have developed over past two decades. The aging "baby boomers" account for a fifty percent increase in the population over the age of 65 but their employment rate has more doubled over that timeframe.

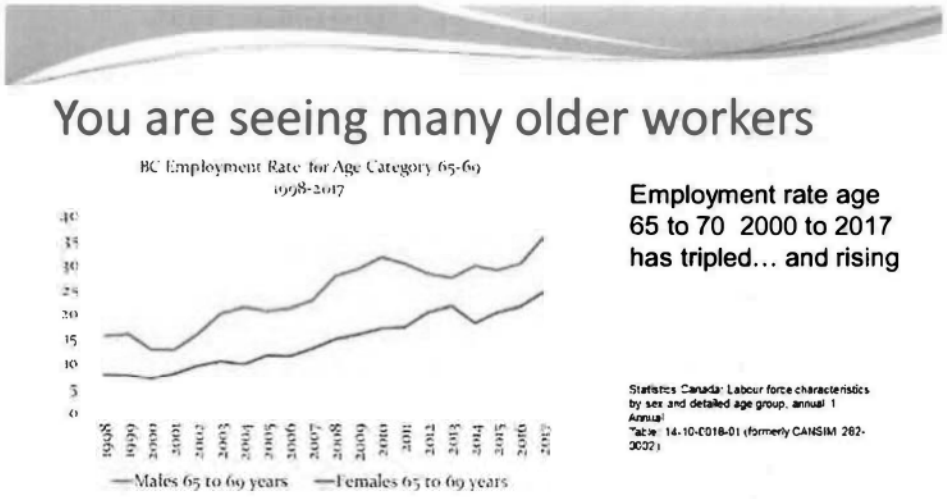


*Figure 19- BC Employment Rate Age Category 65-69 1998-2017*

In 2000, only 7% of females and 12.5% of males in the age category 65 to 69 were employed. In 2017, that rose to 24.2% for females and 35.4% for males. It is not just that there are more older workers in our communities, but they are working at increasing rates. This same pattern has been noted in Canada, US and Australian demographic and employment data.

The influence of this change is reflected in current data. When permanent disability awards are established (under the 2002 provision), the retirement age is declared and entered. There has been a shift toward ages above 65 being entered, a trend that is more evident in recent years. In 2003, just 6.6% of pensions had an expiry date of greater than age 65; for the years 2013-2017, that has increased to between 16.7% and 18.6% of claims.

Expectations about earnings beyond the age of 65 have also changed and future data may provide evidence that the retirement age should be further amended. This rapid increase in employment of those over the age of 65 raises a further issue: How reasonable is it for a worker in his or her 20s, 30s, or 40s to declare their retirement expectations? Changes in the socio-economic realities of the present have altered the expectations of those approaching or entering retirement. A recent survey highlighted three reasons Canadian respondents provided for working past 65 (Rob Carrick, "A New Retirement Era: How many years past 65 will you work?", *Globe and Mail*, November 30, 2017)

- Helping adult children financially
- Low interest and subdued stock market returns
- Rising divorce rates.

This option recognizes this societal shift. While the two-year provision of the existing legislation is not changed by this option, the extension of the presumption of retirement age to 70 has the effect of increasing the benefit period to five years for those injured at age 65, four years for those age 66, and three years for those age 67. Older workers will still be bound by the two-year provision.

**Comparator Data:** Most provinces have an age 65 restriction with an annuity payable at retirement. Quebec has age 68 with a **four-year** period limit on payments beyond age 64 such that the indemnity is reduced by each year (25% less after one year, then 50%, and 75%). There are some variations depending on age. NS and NWT/NU pay for life. PEI's Pension Replacement Benefit intended to replace lost pension income for life.

Alberta recently changed its *Economic Loss Payments* (ELP) as they apply to those over the retirement age. Note that the presumption of age 65 as retirement age in Alberta has a **five year** rather than two-year frame beyond the date of accident. The ELP retirement benefit continues post-retirement can be significant if the pre-retirement payments were significant. Here is an example of how the benefit works[26]:

> ***If your date of accident/illness was on or after January 1, 2018:***
>
> ***ELP retirement adjustment***
>
> *During this time period, normal retirement age is considered to be age 65 or five years after your date of accident, whichever is later. However, if you are able to provide evidence that you planned to work beyond normal retirement age if the injury had not occurred, your ELP will not be adjusted until the date you were planning to retire.*
>
> *This newly adjusted ELP is called an* ***ELP retirement adjustment and will continue to be paid for the rest of your life****. [emphasis added]*
>
> *The ELP retirement adjustment paid is equal to two per cent of your total wage loss compensation. Total wage loss compensation is the sum of all wage loss benefits paid from the date of your accident up to the month in which your ELP/TEL ends. It also includes temporary wage loss benefits.*
>
> ***Here is an example:***
>
> *You were 55 years old when you were injured in 2018.*
>
> *After you returned to work you received an ELP of $262.43 ($3,149 per year)*

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[26] WCB Alberta, "Permanent disability compensation", Fact Sheet, available at https://www.wcb.ab.ca/assets/pdfs/workers/WFS_Permanent_disability_compensation.pdf

*It is now 2028. You are 65 years old and decide to retire.*

*You received a total of $55,000 in wage loss benefits throughout the course of your claim from 2018 - 2028.*

| | | | | |
|---|---|---|---|---|
| *$55,000 (Total amount of benefits paid for the duration of your claim)* | *X* | *2%* | = | *$1,100/yr (or $91.60/month) (The retirement adjustment is normally paid in 12 equal monthly payments)* |

Note that this ELP retirement adjustment is payable for life.

**Legislative amendment**: Change all references in the legislation from age 65 to 70 (and age 63 to 68). All other provisions remain the same.

**Sections of the Act**: 23.1

**Implications for the Accident Fund and Funding Model:**

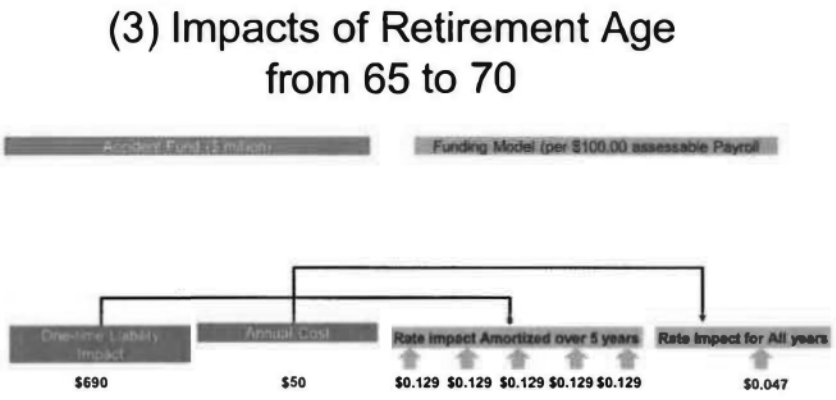



*Figure 20- Impact of Option 3: Increase Retirement Age to 70*

## Option 4: Bring all existing pensions up to date with one-time CPI adjustment

**Description**: Applying a one-time CPI adjustment to all existing LTD and survivor pensions such that the value of their pension is restored to its value in 2002 or more recent year when their award was effective.

**Rationale:** This option would apply prospectively to restore the purchasing power of the original disability award or survivor/dependent pension. There are about 4700 survivors pensions and more than 45,000 workers being paid monthly. Except for those established with an effective data in the current year, each of these receive a cost of living adjustment to their pensions. Since the 2002 reforms, the cost of living adjustment has been limited to the Canadian Consumer Price Index increase less 1%. This option would provide a one-time adjustment which would be sufficient to raise the purchasing value of a pension established at any time in the past to the equivalent of its original value.

To illustrate this option, consider the following example:

> *A worker or survivor in receipt of a monthly award or pension of, say $1000 per month in January 2002 would be receiving $1,358.00 per month in November 2018 under the former "full CPI applied twice a year" provision. The adoption of the current formula (CPI less 1% annually with a floor of zero and a cap of 4%) results in the value of $1,153.97 currently. In this example, the purchasing value of the worker or survivor pension has declined by 15%. This option would restore the original purchasing power of the award to $1358.00 per month effective November 2018.*

The impact will be less for pensions established in recent years. The $584 million reduction in pensions paid to workers and survivors between 2002 and the end of 2017 contributed to the return of WorkSafeBC's Accident Fund to its present status.

**Comparator Data**: Ontario has used full CPI for survivors and those with 100% disability. Beginning in 1995, indexation for those with partial disability was limited. From January 1, 1995 and December 31, 1997, the factor provided for an annual adjustment of 75 per cent of the CPI minus one (with a cap of four per cent, but not less than 0 per cent). From January 1, 1998 through January 2007 an annual adjustment of 50 per cent of the CPI minus one (with a cap of four per cent, but not less than 0 per cent) beginning in July 2007 and followed closely in January 2008 and again in January 2009, pensions were provided general indexing of 2.5% on each occasion in an effort to restore some of the lost purchasing power lost due to the indexation formula.

**Legislative amendment:** Provide the Board of Directors authority to apply a one-time cost of living adjustment to increase existing pensions to account for the full CPI from 2002 or year the award was established if more recent.

**Sections of the Act**: Section 25

**Implications for the Accident Fund and Funding Model:**

# (4) Impacts of bringing all Existing Pensions up to date with one-time CPI lift

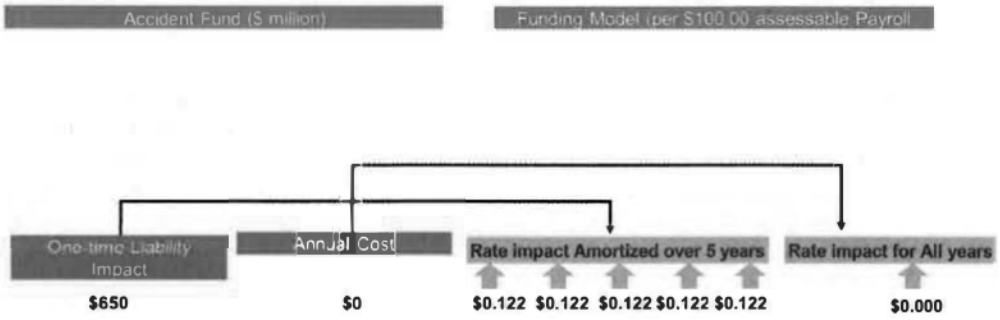



*Figure 21- Impact of Option 4: One-time Lift to Existing Pensions*

## Option 5: Changing the CPI formula prospectively to full CPI as finances allow

**Description**: Separate from the previous option, this option changes the cost of living adjustment formula prospectively by changing the automatic 1% reduction from the CPI rate to an amount from 0% to 1% as determined by the Board of Directors. The existing 4% cap and 0% floor would remain the same.

**Rationale**: This option would change the existing provision to "CPI less an 'adjustment factor' (of between zero and 1%) to be set by the Board of Directors within the current 4% ceiling and 0% floor window. This would permit the Board of Directors some leeway going forward to defer part of all of a scheduled CPI adjustment as a defensive move to protect Accident Fund.

The intent would be to apply full CPI as long as the funding status was equal to or greater than 100% funded. If the funding level was below the 100% funding status, the Board of Directors could modulate the impact by applying some adjustment factor between 0% and 1% rather than the current prescribed 1%. This permits the Board of Directors to take timely defensive action to protect the Accident Fund while minimizing the impact on recipients of compensation and benefits from the fund. The defensive action retains Accident Fund assets and limits upward pressure on employer premiums that may coincide with adverse economic conditions.

A consequential enabling amendment would permit the Board of Directors to provide periodic adjustments to apply any deferred CPI increase when the funding status is above the target capital adequacy level.

This option is similar to defined pension plans that have implemented policies that apply the CPI when funding is available. As with defined pension plans, once indexed by the CPI amount, the new amount becomes the guaranteed pension base amount going forward.

**Legislative amendment**: Change the less 1% provision to "less an adjustment factor between 0 and 1%" as determined by the Board of Directors and enable to Board of Directors to increase the adjustment factor above 1% to restore the value or reduced CPI from previous years.

**Comparator Data:** In Alberta, the indexation formula is based on 100% of the change in the Alberta Consumer Price Index (all items) for the 12 months ending September 30 of the year immediately prior to the adjustment; negative changes are considered zero. COLA from 1996 to 2017 was based on a formula of 100% of the change in the Alberta Consumer Price Index for the 12 months less 0.5% (some variation in the 12-month period frame). Ontario, Quebec, New Brunswick, Newfoundland & Labrador, apply the percentage change in CPI for Canada although the reference period varies. Prince Edward Island, Saskatchewan and Yukon territory use some variant of a provincial CPI.

**Sections of the Act**: Section 25

**Implications for the Accident Fund and Funding Model:** The effect for costing purposes would be the impact of full CPI.

# (5) Changing the CPI formula prospectively to full CPI as finances allow

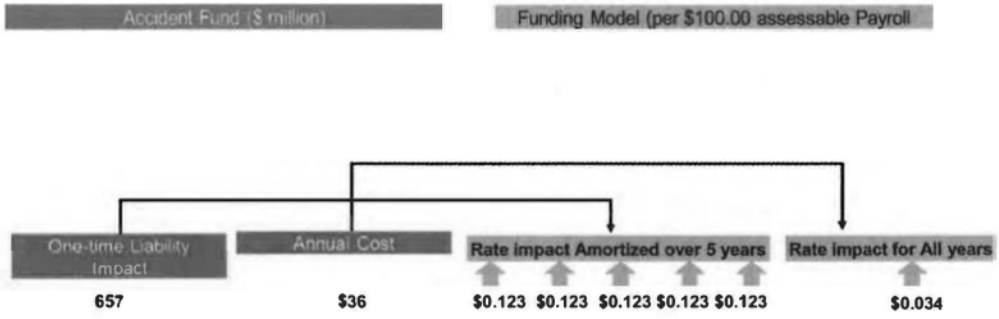



*Figure 22- Impact of Option 5: Full CPI Prospectively*

## Snapshot of Fatality Claims and Survivors [Sidebar]

For 2017, there were 158 worker deaths accepted fatal claims. Of these,

- 87 (55%) deaths were due to diseases and
- 71 (45%). of due to motor vehicle incidents and other injuries
- 28 (18%) were receiving pension payments from WorkSafeBC prior to their deaths.
- 109 (69%) had survivor pensions (average for 2010-2017: 75%)

**Summary of Fatal With Survivor Indicator**

| Fatal Accepted Year | Total Fatal Count | With Survivor Pension | No Survivor Pension |
|---|---|---|---|
| 2010 | 156 | 123 | 33 |
| 2011 | 146 | 101 | 45 |
| 2012 | 151 | 119 | 32 |
| 2013 | 130 | 95 | 35 |
| 2014 | 175 | 131 | 44 |
| 2015 | 122 | 97 | 25 |
| 2016 | 144 | 112 | 32 |
| 2017 | 158 | 109 | 49 |
| 2018 | 111 | 74 | 37 |

**Summary of Fatal With Survivor by Survivor Type**

| Fatal Accepted Year | With Parent Survivor Pension | With Spouse Survivor Pension | With Child Survivor Pension | With Other Survivor Type Pension |
|---|---|---|---|---|
| 2010 | 2 | 117 | 32 | 0 |
| 2011 | 2 | 96 | 36 | 1 |
| 2012 | 3 | 112 | 28 | 0 |
| 2013 | 2 | 88 | 27 | 0 |
| 2014 | 4 | 128 | 29 | 1 |
| 2015 | 1 | 92 | 23 | 0 |
| 2016 | 3 | 103 | 20 | 1 |
| 2017 | 0 | 107 | 21 | 0 |
| 2018 | 0 | 69 | 14 | 2 |

Note: The total of pension by Survivor type is not equal to the total of claim 'With Survivor Pension' as a claim may receive more than one type of survivor pension (e.g.; spouse and child)

## Option 6: Presumed maximum earnings on the death of a worker

**Description**: Presume earnings on the death of a worker to be equal to maximum. This legislative change would set the average earnings of a worker in a work-related death to the maximum. Again, this is not retroactive but would have an impact in the transition year. After that, there would be an impact on premiums. Note, this change would apply to personal optional protection as well as other cases where a wage rate is required to set survivor or dependent benefit amounts.

**Rationale**: Survivor and dependent benefits in fatality claims where the worker is working prior to the death (or working immediately prior to an injury leading to death) are based on the worker's average earnings. Unlike other defined compensation provisions, the beneficiary is not the worker. Survivor and dependents beneficiaries of workers' compensation insurance lose more than the worker's income. They often lose the support that enables their own earning capacity, education and even housing options. This provision would presume average earnings for setting compensation to be equivalent to the current maximum, simplifying adjudication and providing a standard benefit that values all lives equally.

The current provisions for rate setting for survivors is complex. The following figure was provided to help explain the current process.

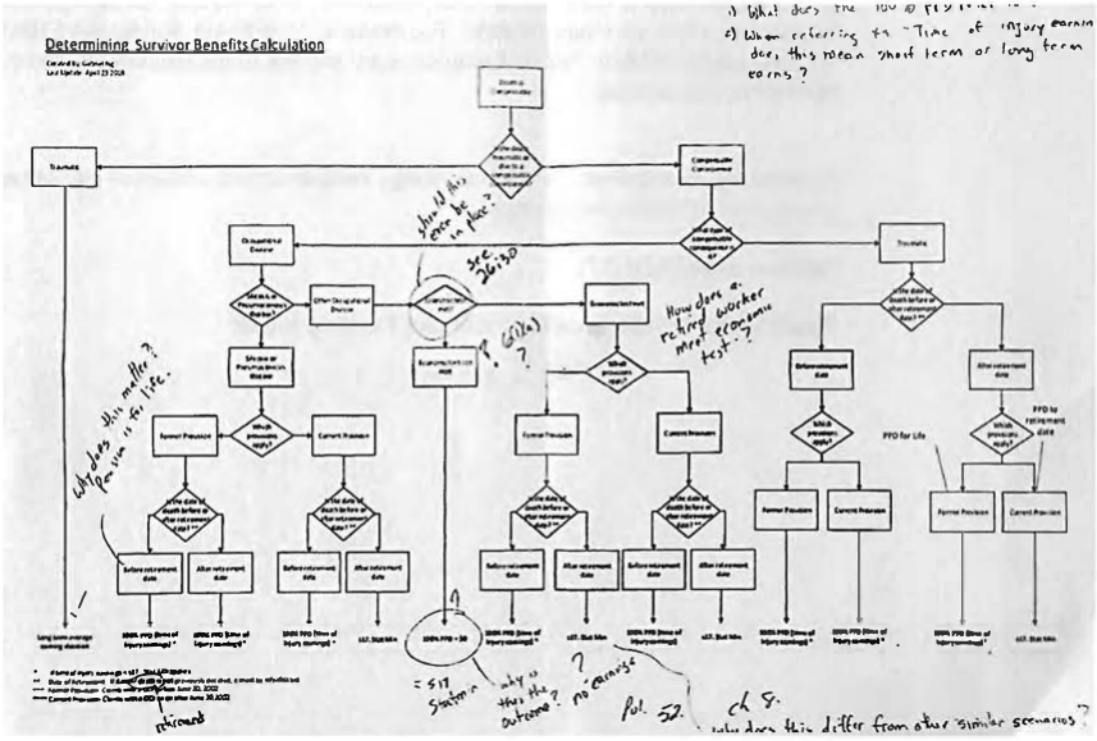



*Figure 23 - Photograph of flow chart for determining Survivor Benefit Calculation*

This option proposes no retroactivity and the option has no impact on death claims where there are no qualified survivors or dependents. (see sidebar for recent statistics on fatality claims and survivors).

**Comparator Data**: The variations in compensation for work-related death vary widely. This comparison looks only at the reference point used to calculate some or all of the benefits payable and specifically where a sum other than the workers' average earnings is payable on death. A common example is a base amount used in lump-sum payments. For example, Newfoundland & Labrador have an immediate lump-sum provision that is equal to 26 times the worker's average weekly net earnings at the time of the injury, or $15,000, whichever is the greater. New Brunswick has a lump-sum provision where the amount is "equal to 50% of the New Brunswick Industrial Aggregate Earnings". PEI has a lump-sum provision that provides $10,000 for the education of each orphaned child.

Ontario provides a lump sum where age of the survivor is used to modulate the amount:
$78,616.07 increased by $1,965.40 for every year under 40 years of age or reduced by $1,965.40 for every year over age 40. $39,307.99 (minimum) - $117,924.03 (maximum). (AWCBC Dependency Benefits and Fatalities – Summary)

Recent changes in international jurisdictions include Kentucky's move to paying a lump sum to the estate instead of paying funeral and other benefits. The lump-sum value in Kentucky increases annually with inflation. (2017: $82,022.93 $US). Note that the lump-sum value is independent of earnings and that the payment to the estate occurs even if there are no dependents or survivors.

Death entitlements in Australia are independent of worker earnings in most jurisdictions. The lump-sum entitlements vary by state. For example, New South Wales pays $760,000 ($AU), Victoria pays $589,650 ($AU). Lump sums are payable to the estate where there are no survivors or dependents.

**Legislative amendment**: Intent is to change replace current method of rate setting with an assumption of maximum earnings.

**Sections of the Act:** 17

**Implications for the Accident Fund and Funding Model**:

# (6) Presumed maximum earnings on the death of a worker

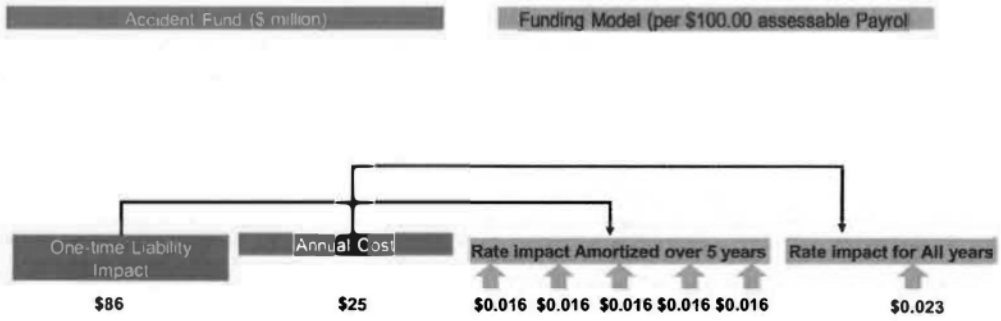



*Figure 24- Impact of Option 6: Presume Maximum Earnings on Death of a Worker*

## Option 7: Benefit to Estate on the Death of a worker.

**Description**: This would apply to all accepted fatality claims prospectively (including the death of a worker not currently in the workforce such as a retired person who dies of mesothelioma and workers who are suffer traumatic fatalities). In addition to any other death benefits, on acceptance of the fatality as being work-related, a payment of 50% of the maximum yearly compensation benefit will be made to the estate. This increases the liability of past claims where a work-related death may still be determined and will have a cost impact on rates going forward that would have to be quantified. Note, the intent of this change is to make an amount payable to the estate and would require a change allowing the executor or executrix of the estate to make a claim.

**Rationale**: Every life has value. Other provisions provide benefits for survivors and dependents; however, some fatality cases may have no survivors or dependents who are financial dependent or entitled to other compensation. This proposal would apply to all accepted fatality cases and be payable to the estate. This would ensure all cases of work-related fatality are recognized with an equal amount of compensation. If there are no dependents or survivors, the executor could apply for, receive and distribute the benefit as part of the assets of the estate.

**Comparator Data**: [See notes under Option 6, noting lump sum payments may be based on something other than earnings and may be made to the estate]

**Legislative amendment**: Add a new provision.

**Sections of the Act**: Section 17

**Implications for the Accident Fund and Funding Model:**

## (7) Benefit to Estate on the Death of a worker [50% 12 months of max benefit]

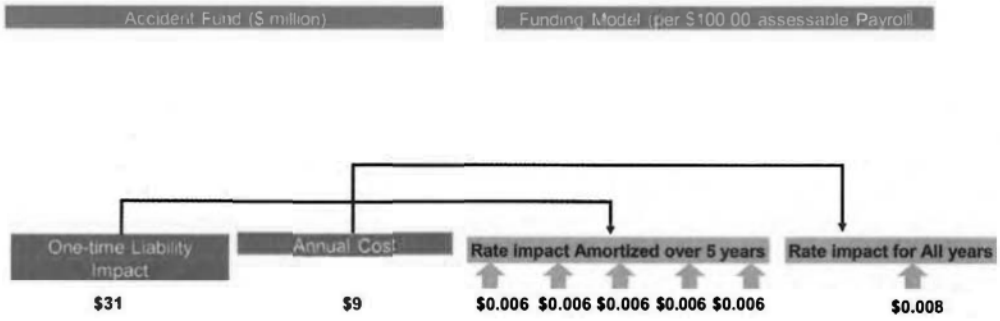



*Figure 25- Impact of Option 7: Benefit to Estate on Death of a Worker*

## Option 8: Enabling amendments to permit greater security for the Accident Fund

**Description**: Protecting the Accident Fund is critical to the sustainability and stability of the workers' compensation system. These legislative changes provide WorkSafeBC with the tools necessary to protect present and future employers from having to bear costs when other employers become delinquent, insolvent, or restructure in ways that currently frustrate efforts to ensure the proper and adequate contribution to the fund.

**Rationale**: Any delinquent or abandoned accounts transfer the incurred cost of claims and the shared cost of liabilities from offending employers to other ratable employers who diligently participate in the funding of the system by keeping their accounts current. This option identifies gaps in the current legislative framework and proposes amendments that would secure WorkSafeBC's position in order to recover the maximum possible benefit in order to limit the externalization of costs to other employers. This proposal also includes a provision that would place WorkSafeBC's pension plan for its own employees on a par with other large, public sector pension funds. This action is consistent with the protections in the Municipal, Teachers, and other pension plans but would eliminate the additional cost of providing insolvency protection while WorkSafeBC continues in a surplus funding position.

**Comparator Data:** Of the 12 Canadian jurisdictions reviewed, six of them have some form of directors' liability –.

All of them had similar challenges relative to collections and identified employers without assets, out of province employers and employers who keep reincorporating to avoid paying existing liabilities as an issue. All had legislation in some form which assisted them to deal with successor firms, the ability to collect unpaid assessments of a subcontractor from a prime contractor and everyone, except Quebec which uses a form of lien priorities.

The form of directors' liability varies across the six jurisdictions. Some hold directors jointly and severally liable for the payment of the corporate debt while others jurisdictions enforced workers' compensation payment through municipal tax rolls where the liability is treated the same as a tax liability and is collected by the municipality - in some cases for a fee.

Jurisdictions that have true directors' liability include Manitoba, Nova Scotia, P.E.I. , Newfoundland/Labrador and Quebec. When contacted, these jurisdiction report that notifying the employer that the directors will be held liable for the corporate debt often prompts immediate payment. Quebec implemented this in 2011 and have enforced directors' liability in 400 situations since 2013. All jurisdiction with director's liability advised that it was an effective collection tool especially in situations where the company may not have any assets but the directors may have assets.

The only jurisdiction with collection authority similar to CRA's "requirement to pay", is Alberta. A "demand to pay" puts a hold on a firm's bank account for 30 to 60 days. WorkSafeBC's only collection avenue on a business where there are no assets is a garnishing order served on a prime contractor; a "requirement to pay" option would provide greater flexibility to include bank accounts and other receivables.

Eleven of the jurisdictions have legislation to deal with successive employers where a firm shuts down one account under one legal entity name, which has outstanding debt and opens up another legal entity, however, it is a totally non-arms-length situation as the business is the same in every aspect except for their legal name.

All jurisdictions identified this as a problem. It is often difficult to identify the successor registration and there are specific criteria which have to be met before it can be transferred. WorkSafeBC's legislation in this area is under 49(2). Expanded powers would conceivably result in increased revenue to the Accident Fund. More importantly, increased authority will improve compliance and the reputation of WorkSafeBC holding employers accountable for their responsibilities under the Act.

**Legislative amendment**: [See table below for intent].

| Item | Description | *WC Act ref.* | Why it would be of value? |
|---|---|---|---|
| 1 | Adding **Director's Liability** | New power | Intent is to hold directors liable for unpaid assessments relative to corporate debt, similar to what Canada Revenue Agency (CRA) has under their legislation (Section 227.1 (1) of the *Income Tax Act*).<br><br>Possible Options:<br>1. Could be defined so that Directors have liability for all corporate debt OR<br>2. Could be liability is capped (as per Employment Standards)<br><br>In WorkSafeBC context, one approach could be to have Directors' Liability for unpaid Prevention Penalties & related charges. A limited/Incorporated firm which has been assessed for one or more safety infractions can shut down one legal entity and open another the next day, and there is no effective legislation to recover this debt in full. (s. 51 and s. 49 (2), if appropriate, would only recover a portion of the debt). As a result, these employers continue to carry on unsafe work practices and put workers' lives at risk and suffer no financial consequences.<br><br>**Benefits:** Allow for greater collection potential and to reinforce the legislative mandate and intent relative to safe work practices. |
| 2 | Expanding interpretation of **Levy Unpaid Assessments on Successive Employer** | s. 49 (2) | Current legal interpretation of this section of the *Act* permits WorkSafeBC to levy unpaid assessments on the successive owner or employer only for the year in which the change in ownership occurred.<br><br>**Benefits**: Allow for greater collection potential and to deter debtors from closing down one day and opening a new legal entity the next day, which is, in effect, the same business. Support the legislative mandate relative to safe work practices.<br><br>*Note: Mar. 1, 2017 - Currently reviewing interpretation with Legal Services, and Peter Seddon believes there is a strong case to be made for year of transfer plus debt owed from immediately prior year (given post-pay / remitting model). This may be a potential mitigation. Currently awaiting completion of that review.* |
| 3 | Adding **Requirement to Pay** | New power | This would be a new "power" which would allow Collections Officer to write a "requirement to pay" when they identify a firm's receivable or bank account. This is an authority that Officers who work for Canada Revenue Agency have under their legislation (Section 224 (1) of the *Income Tax Act*).<br><br>**Benefits**: Would reduce legal costs and staff necessary to process legal actions. It would also mitigate delays & challenges encountered with issuing garnishing orders and increase timeliness and potentially increase recovery of debt. |
| 4 | Eliminate **solvency** requirement | | All of the large public sector pension plans (or at least the "big four") are exempt from the requirement to conduct solvency valuations in addition to the going concern valuations that we do every three years. Our plan is not exempt. The requirement for our pension plan to do this can result in significant costs to the system, for example we made a $139 million contribution to the pension plan in 2011 due to the solvency requirements, while we were in a surplus from a going concern perspective. |

**Sections of the Act:** See table. Other legislation may be involved.

**Implications for the Accident Fund and Funding Model**:

## (8) Enabling Amendments to provide greater security for the Accident Fund

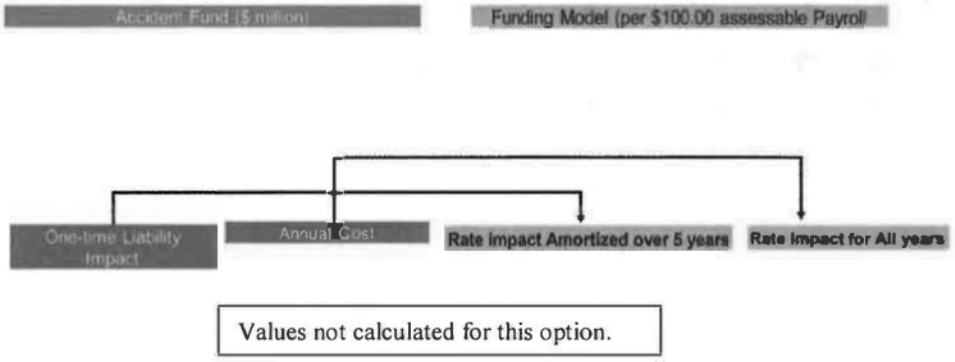



*Figure 26- Impact of Option 8: Enabling Amendments for Greater Fund Security*

## Option 9: Diagnostic and prophylactic treatment prior to Claim Acceptance

**Description**: Prior to rendering a decision on claim acceptance, workers may require diagnostics and treatment. At present, WorkSafeBC can pay for diagnostics but with few exceptions, are unable to pay for treatment. [HIV exposure through needle-stick injury is a notable exception]. This change would allow payment for diagnostic and prophylactic treatments to be arranged for and paid prior to claim acceptance on a "without prejudice" basis.

**Rationale:** Some exposures and mental injuries do not result in disability or occupational disease within the current definitions; left untreated (or if treatment is delayed or inadequate) a worker may develop a serious injury or disease at a later date. This provision would allow WorkSafeBC to pay for medical diagnostics and treatments before formally deciding on claim acceptance. Mental injury conditions may benefit from immediate treatment but access to care may be limited without WorkSafeBC's intervention and payment to expedite care (as provided for in the Canada Health Act). Providing treatment or paying for prophylactic treatment prior to decision may prevent a case from becoming a serious claim. Certain occupational diseases such as HIV, tuberculosis, or SARS exposures and psychological injuries (such as PTSD) may be exacerbated by delay in treatment. This provision would enable the Board of Directors to establish policy to cover the payment of such cases.

To provide services in these cases, WorkSafeBC may use administrative funds and has found ways in policy to justify payment in certain circumstances. This provision would provide a direct means within legislation to approve payment in advance of the formal claim acceptance.

**Comparator Data**: Most Canadian jurisdictions do not have a provision in legislation for payment in advance of claim acceptance. Newfoundland & Labrador advises that prior to a claim being accepted as work related, WorkPlaceNL will provide an initial course of physiotherapy (12) or chiropractic (15) treatment. They can also assign a claim to their case management area for early intervention while a claim is undergoing adjudication. Manitoba, like BC, has policy to allow for payment for post-exposure prophylaxis treatment for exposure to potentially infectious blood or bodily fluids in HIV cases. In the Yukon Territory (where TB exposure cases are also handled in a way similar to HIV exposures), the Claims Division codes the claim to "incident only" without actually accepting the claim for a work-related injury, because that allows them to incur expenses on the claim for medical assessment and treatment. If the worker developed the illness or disease later, the claim would be changed to "accepted" with or without lost time as appropriate based on the case

Some jurisdictions surveyed noted that psychological treatment for a witness to a traumatic event may be initiated and covered prior to a formal diagnosis even if the case does not proceed. In Saskatchewan, the WCB may provide coverage for counselling services and required medication before the claim is formally accepted (while the claim is being adjudicated). If the claim is denied, costs are not charged to the claim.

**Legislative amendment**: Grant Board of Directors authority to pay medical expenses before claim acceptance on a "without prejudice" basis.

**Sections of the Act**: Sections 5 and 21

**Implications for the Accident Fund and Funding Model:**

## (9) Diagnostic and prophylactic treatment prior to Claim Acceptance

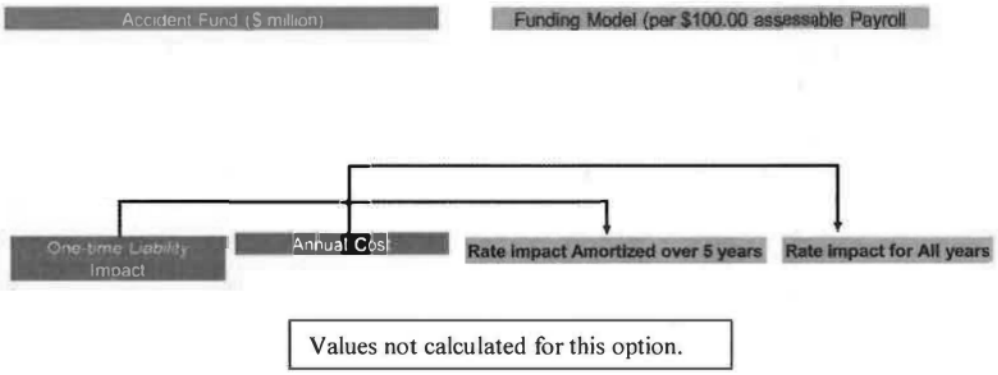



*Figure 27 - Impact of Option 9: Payment Authority for Diagnostic and Prophylactic Treatment in Advance of Formal Claim Acceptance*

## Interaction Effects of Options 2 through 7

The options in this review have been individually costed but there are interactions among various options. As a result, a simple tallying of the cost impacts of each option would not present an accurate representation of the overall cost impact. To address this issue, the options with significant costed impacts have been considered together. Excluding the downward impact on rates that would follow from an increase in the assessable / insurable maximum option, the interaction effects are summarized in the following costing chart:

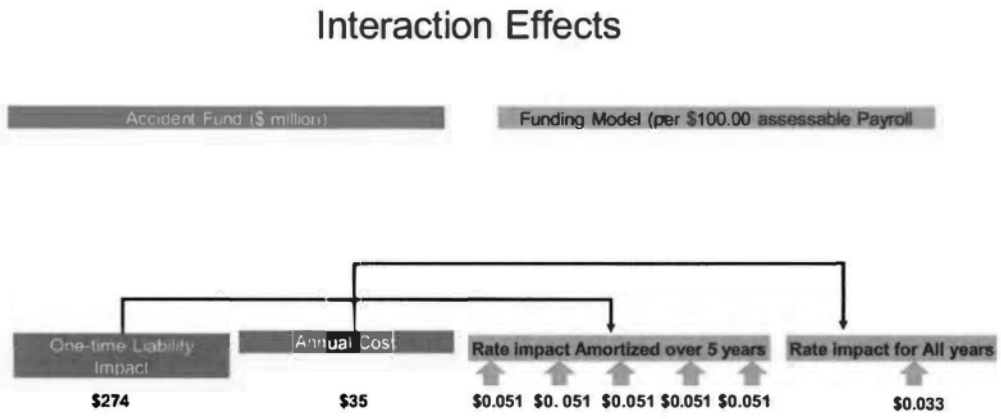



*Figure 28- Interaction Effects*

## Conclusion

The last significant changes to the workers' compensation system in British Columbia were enacted when the funding status of the Accident Fund was declining. The sustainability of the system was in question. The changes adopted at the time primarily impacted those in receipt of pensions (workers with permanent total or partial disability awards, survivors, and dependents) and those who would be injured after the changes were passed into law.

The mandate and powers of the Board of Directors also changed. These changes allowed the Board of Directors to establish new policies, fund new administrative programs, and establish effective controls on investment and funding decisions. Acting in the best interests of the workers' compensation system, the Board of Directors has established funding targets, investment policies, and reserves responsive to the risk environment and essential to the long-term sustainability of the system.

Successive Boards of Directors have authorized premium rates for assessable employers that have, at times, increased the Accident Fund's funding status through higher rates. They have also used their authority to offset the actual cost rate required to moderate rate increases and, more recently, to reduce the effective base premium. Other than authorizing changes to services and administration, the Board of Directors had no authority to alter the fundamental parameters of the compensation and benefits available to workers under the legislation.

The options proposed in this review are selective and not exhaustive. Options that address the maximum insurable and assessable earnings address significant shifts in the earning pattern and age distribution of BC workers. The option to restore the purchasing power of those on permanent disability, survivor or dependent pensions is only possible because their shared burden of the past unfunded liability has contributed to the improvement in the funding status to its recent and present levels. Providing full CPI protection going forward returns WorkSafeBC's compensation benefits on this measure to the equivalent of most workers' compensation systems.

Two options address benefits for work fatalities. These options are improvements to the system, acknowledging that every worker's life has value and maximizing the benefits for survivors and dependents.

Two options are not costed. Enhancing WorkSafeBC's ability to collect under directors' liability and other authority enhancements will protect the integrity of the Accident Fund. Expenses associated with diagnostic and preventative or prophylactic treatment are currently being made to some extent and additional expenditures will likely be cost neutral because of expected avoided claim costs.

Other than these two options, all other options presented have an impact on the Accident Fund liabilities and assessable premiums in future years. These are summarized in the table below:

| *Option* | *Accident Fund ($millions)* | | *Funding Model Impact (per $100 payroll)* | |
|---|---|---|---|---|
| | *One-time Liability* | *Annual Cost* | *Amortized Cost (Each year for 5 years)* | *All years* |
| Option 1: *Status Quo* | 0 | 0 | 0 | 0 |
| Option 2: **Increase the Statutory Maximum to cover all earnings for 90% of workers** | 31 | 21 | 0.006 | 0.020 |
| Option 3: **Increase presumed retirement age to 70** | 690 | 50 | 0.129 | 0.047 |
| Option 4: **Bring all existing pensions up to date with one-time CPI adjustment** | 650 | 0 | 0.122 | 0.000 |
| Option 5: **Changing the CPI formula prospectively to full CPI as finances allow** | 657 | 36 | 0.123 | 0.034 |
| Option 6: **Presumed maximum earnings on the death of a worker** | 86 | 25 | 0.016 | 0.023 |
| Option 7: **Benefit to Estate on the Death of a worker.** | 31 | 9 | 0.006 | 0.008 |
| Option 8: Enabling amendments to permit greater security for the Accident Fund **Values not calculated for this option** | 0 | 0 | 0 | 0 |
| Option 9: Diagnostic and prophylactic treatment prior to Claim Acceptance **Values not calculated for this option** | 0 | 0 | 0 | 0 |
| **Interaction Effects Options 2-7** | 274 | 35 | 0.051 | 0.033 |
| **Total Option 2-9 plus Interaction Effects** | **$2,419** | **$ 176** | **$ 0.453** | **$ 0.165** |
| ***In addition, there is about a 5% reduction on the rate due to higher payroll base. Based on 2019 average rate, this translates to a 0.078 rate reduction.*** | | | | ***($0.078)*** |

*Figure 29 - Costing of Options Table*

This review was time and scope limited to the larger parameters of the systems and those most in need of adjustment to keep coverage in line with post 2002 socio-economic, demographic and comparator changes. The options proposed contain specific proposals, considered in an overall context. The choices made in developing the options are not intended to restrict the choices or judgements of legislators; rather, the options are intended to provide an actionable set of alternatives to the *status quo* that address the desire of all stakeholders to see a balanced, sustainable system that strives to meet the needs of workers and employers.

There are other possible legislative provisions and proposals not addressed by this review. Many of these are more controversial or difficult to model and cost. Further options may be addressed by through additional researched and focused analysis in future review initiatives.

There are also many policy and administrative issues that could be addressed in future reviews. Changes in policy are the exclusive purview of the Board of Directors; administrative changes also involve the senior leadership of WorkSafeBC. Both the Board of Directors and the administration will, no doubt, continue to engage stakeholders to identify the changes most urgently in need of reform.

Our workers' compensation system is intended to benefit workers, employers and the people of British Columbia. The set of options presented here provides a means of achieving greater symmetry in achieving that intent. Employers have already benefited directly from the strong funded status through lower overall premium rates and direct offsets to those rates; they will continue to do so as conditions allow. Through these options, workers will share to a similar extent but over a longer, future time-frame through specific changes to the defined compensation and benefits under the legislation.

All British Columbians benefit from a strong workers' compensation system that supports safe workplaces and provides injured workers and survivors with improved compensation that reduce externalized costs to tax payers and communities. This set of options is responsive to the changing realities of the workplace and balances the benefits of a strong funded position with the need for stable, predictable premium rates—all in the best interests of the workers' compensation system.

# Appendices

## A. Employer Liability and the Workers' Compensation Insurance landscape.

Work-related injuries occur. They have human and financial costs. In the absence of workers' compensation laws, an injured work (or the worker's family in the case of fatality) could seek compensation for those losses from the employer.

Employers have a well-established responsibility for the safety and health of their employees. If the employer, employer's agents (including fellow workers and managers) or processes were at fault for the injury, illness or fatality, then the employer would have an obligation to compensate for losses. In the absence of any insurance, the common law would apply. Disputes over the attribution of fault, the extent of the loss and the quantum of the compensation were common and litigation with adjudication by the courts was common.

Prior to workers' compensation, laws defining employer liability in work injury cases evolved. The evolution of the law restricted defenses an employer might invoke to limit or avoid financial responsibility. In many countries, "employer liability" laws defined the responsibilities of employers for work-related injuries and deaths. Workers' compensation laws often precisely define compensation and benefits. How employers manage the financial risk associated with that liability is either left to the employer or mandated by the state. The state may mandate that employers obtain workers' compensation insurance coverage. The following briefly describes the range of arrangements for workers' compensation insurance.

- Individual self-insurance (with or without self-administration) – the employer bears all the present and future cost of work-related injuries. In BC, come entities such as the Federal Government are self-insured, depositing with WorkSafeBC funds to cover the current cost of claims and their administration and providing a surety to cover future costs. BC does not allow self-insurance with self-administration, while this is permitted in some US states. Liability for injury costs are not transferred from the self-insured entity. In jurisdictions with no workers' compensation statutory requirements or sectors outside of or exempt from the scope of coverage, many firms chose to self-insure. Texas allows firms to opt out of the workers' compensation coverage and many larger firms chose to self-insure.

- Employer liability insurance -- commonly available to cover work-related injury not covered by workers' compensation. The insurance transfers the financial risk to the insurer and may be required by the state but does not necessarily protect the employer from suit. Payouts or "settlements" typically conclude the employer's liability. The amount may be agreed by the parties, mediated or ordered by the courts. Structured settlements or settlement trusts may be used to convert lump sum awards to a stream of income. The funds in the trust are managed for the security of the beneficiaries of the trust.

- Group Self-insurance, mutual or cooperative insurance pools - are insurance arrangements where the insured policy holders are the owners and share in the profits of insurance. Some US state funds follow this model (Missouri Employers Mutual, for example). In the wake of the global financial crisis and self-insurance pool failures, access to this insurance arrangement became far more restrictive. New York state, for example, only allows the most secure groups that survived the crisis to continue and only then after meeting new, more stringent criteria including more robust security deposit requirements; no new groups are allowed in that State. Regulating and

oversight are typically carried out by industrial accident boards and commissions or government insurance boards. The liability for work-related injuries is transferred from the individual employer to the shareholders who are the policyholders. The state may require security deposits or mandate contributions to guarantee funds.

- Private insurance is familiar to most readers. Insurance is provided by either a closely owned or publicly traded entity. Shareholders may receive dividends from the insurance activities. Most of the US market follows this alternative and have structures to oversight, rate approval and guarantee funds to cover the claims when the insurance entities become insolvent. (Liberty, Travelers, Hartford and AON are some high-profile examples). Private insurers compete for market share but are free to refuse coverage to any employer they consider poor risks. States with this model generally have assigned risk pools to handle this "residual market". Liability for claim costs is fully transferred from the employer to the insurer. The insurer operates on a for-profit basis as a going concern, covering losses from reserves and current premiums, distributing profits to shareholders.

- State funds (exclusive or competitive)—Canadian workers compensation boards including WorkSafeBC fall into the exclusive state fund (sometimes called monopoly funds). Washington state's Department of Labor and Industry (LNI) has exclusive workers' compensation jurisdiction in that state, but does allow some self-insurance with self-administration subject to its oversight. The state occupational health an safety function is also administered by LNI.. Oregon's state fund (known as SAIF) is a competitive insurer with about half the market share. The California State Fund is typically classified as a competitive state fund; however, it is technically the insurer of last resort, insuring firms turned down by those in the competitive market. Employers transfer the financial risk of work-related injuries to the insurer. The insurer operates as a not-for-profit going concern.

## B. Workers' Compensation and the *Canada Health Act*

Workers' compensation insurance in Canadian, US and Australian jurisdictions include coverage for medical and other health care provided as a consequence of the work-related injury.

In Canada, universal healthcare originated in Saskatchewan in the 1950s. *The Royal Commission on Health Services in Canada* (1961-1964) (also known as the Hall Commission) recommended all provinces create medical services plans that conformed to a national standard. Constitutionally, the provinces have jurisdiction over issues related to hospitals (and by extension healthcare) and labour. In exchange for agreeing to national standard based on five principles (public administration, comprehensiveness, universality, portability and accessibility), certain taxation provisions and funding arrangements were transferred from the federal government to the provinces.

The legislation and funding have evolved over time but are consolidated in the current *Canada Health Act*. Note the current definition of insured services continues the exclusion of workers' compensation:

***insured health services*** means hospital services, physician services and surgical-dental services provided to insured persons, but does not include any health services that a person is entitled to and eligible for under any other Act of Parliament or under any Act of the legislature of a province that relates to workers' or workmen's compensation;

The exclusion allows workers' compensation systems to make specific arrangements for the treatment of injured workers. This includes alternative fee schedules for providers and direct payment for necessary services outside the province. At various times, that ability has been used to expedite treatment and access private clinical care.

## C. Additional Concepts in Workers' Compensation Accounting

### Workers' compensation costs: Incurred vs. Actual

For work-related injuries and disease that result in an accepted workers' compensation claim, the full cost of the claim includes all medical and healthcare-related costs as well as compensation payments for short- and long-term disability, physical and vocational rehabilitation and administration. The eventual actual cost of claim by definition can only be determined when the last payment is made and all related administration is complete. For a claim involving a young person with a work-related permanent disability, the life of the claim may extend for decades. In the case of a young person with a dependent disabled child, the costs associated with the claim may extend for the life of the dependent.

As an alternative, workers' compensation insurers use various methods to estimate the cost of a claim at the time the claim is established. One method involves "reserving" on a claim by claim basis. The cost of the claim is established and revised at various stages and the overall liability of all claims can be estimated by summing the per-case reserves. This method is common in workers' compensation systems that allow for claim "settlements". Another method is to value the future liability of all claims based on patterns established from the population of past and current claims. These estimates consider the costs over time. The incurred cost of a claim can be considered as the value needed today to pay all claim-related expenses for the lifetime of a claim.

### Workers' compensation liability and time

In the absence of workers' compensation insurance and applicable statutes of limitation, an employer's liability of for work injury would continue for the life of the firm. Even if the firm goes out of business, the liability for the work injury would continue. Workers' compensation insurance transfers the liability for the injury costs to the insurer; as long as the insurer is solvent, the actual cost of compensation and medical care will continue to be paid.

A claim for a work-related injury is usually made within the coverage year but could be made later. Most workers' compensation systems allow for claims to be made for six months or a year after the injury but allow for extensions in certain circumstances. Workers' compensation insurance provides coverage for a coverage (often a calendar) year. Injuries in that year that result in claims even if they are made after year end are attributable to that year. Claims that occur late in the coverage year or are delayed because of litigation or investigation can result in claims being attributed to the coverage year many years later. The following table from WorkSafeBC Statistics 2017 demonstrates the issue:

## Table 2-8: Days lost and claims first paid in 2017, by year of injury

| Year of injury | Number of short-term disability, long-term disability, and work-related death claims[1] first paid in 2017[2] | Total days lost in 2017 from all claims[3] |
|---|---|---|
| 2007 and prior | 53 | 45,459 |
| 2008 | 9 | 9,922 |
| 2009 | 7 | 10,425 |
| 2010 | 10 | 8,492 |
| 2011 | 10 | 13,802 |
| 2012 | 16 | 19,173 |
| 2013 | 49 | 36,878 |
| 2014 | 117 | 66,405 |
| 2015 | 443 | 164,152 |
| 2016 | 5,419 | 867,391 |
| 2017 | 48,253 | 1,508,128 |
| Total | 54,386 | 2,750,227 |

More than 10% of the claims first paid in 2017 were related to injuries that occurred in prior years; nearly half of all days lost and compensated in 2017 relate to injuries that occurred in prior years.

To fully account for the many years the actual costs related to a claim will develop, workers' compensation systems track past experience and include these cost (appropriately discounted) in the incurred cost estimates.

### Workers' compensation and actuarial adjustments

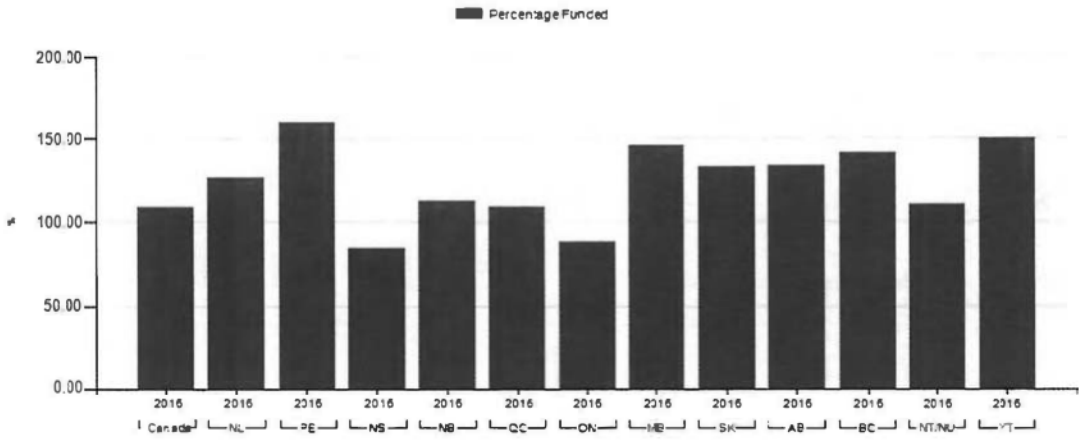
Estimates of the future compensation, healthcare and rehabilitation costs of all past claims can change. Experience garnered from previous claims can show shifts in patterns of cost, mortality, claim duration and return-to-work success. These changes are accounted for each year and may increase or decrease the valuation of claims that must be paid into the future.

### Workers' compensation and accounting for Occupational Disease

Occupational disease claims are often related to work exposures over many years (hearing loss, for example) or limited exposure in years long past (mesothelioma and other asbestos disease, for example). The long latency of such disease means that the exposures that caused the claim are disconnected in many cases from the current employer. In many cases, the employer or employers where exposure took place may no longer be in existence and a workers' current employer may have nothing to do with the worker developing the disease. Although the claim may be established in the year of diagnosis, the employer at the time of diagnosis is not charged with claim costs.

## D: List of Consultations

| Name | Organization | Job Title | Credentials |
|---|---|---|---|
| Diana Miles | WorkSafeBC | President & Chief Executive Officer | BA, CPHR |
| Brian Erickson | WorkSafeBC | Chief Financial Officer and Senior Vice-President, Finance & Information Technology | CPA, CGA and MBA |
| Lori Guiton | WorkSafeBC | Director, Policy, Regulation & Research Division | LL.B |
| Dr. Dave Baspaly | Council of Construction Associations | President | CMC, DBA, MA, BA |
| Grant McMillan | Council of Construction Associations | Strategic Adviser | |
| Trevor Alexander | WorkSafeBC | Senior Vice-President, Operations | |
| Lee Loftus | WorkSafeBC | Board Member | |
| Alan Cooke | WorkSafeBC | Board Member and Chair of Audit Committee, Investment Committee member | Actuary, FCIA, FSA |
| Lillian White | WorkSafeBC | Board Member and Co-Chair, Policy, Regulation & Research Committee | CPA, CGA |
| Lynn Bueckert | WorkSafeBC | Board Member and Co-Chair, Policy, Regulation & Research Committee | |
| Chris Hartmann | WorkSafeBC | Director, Return-to-Work Services, Voc Rehab & Disability Awards | M.ED |
| Chris Gardner | Independent Contractors and Businesses Association of BC | President | |
| Tim McEwan | Independent Contractors and Businesses Association of BC | Senior Vice-President | |
| Irene Lanzinger | BC Federation of Labour | President | |
| Jennifer Leyen | WorkSafeBC | Director, Special Care Services | |
| Gerry Paquette | WorkSafeBC | Manager, Class & Rate Modification PR | MBA, Six Sigma Blackbelt |
| Charmaine Chin | WorkSafeBC | Director, Business Intelligence & Analytics | CPA, CMA |
| Ernest Urbanovich | WorkSafeBC | Senior Research Analyst | MS in OR and PhD (Senior Research Analysts) |
| Terry Martin | WorkSafeBC | Business Intelligence Analyst | |
| Jennifer Wing | WorkSafeBC | Manager, Business Intelligence & Analytics | |
| Ryan Tse | WorkSafeBC | Actuary | ASA, ACIA, FRM and MSc |




| | Canada | AB | BC | MB | NB | NL | NS | NT/NU | ON | PE | QC | SK | YT |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 2016 | 2016 | 2016 | 2016 | 2016 | 2016 | 2016 | 2016 | 2016 | 2016 | 2016 | 2016 | 2016 |
| 15-Percentage Funded(%) | [1] 108.70 | 133.76 | 141.75 | 145.90 | 112.10 | 126.10 | 84.10 | 110.00 | 87.90 | 159.40 | [2] 109.00 | 133.07 | 149.80 |

*Extraced On: 11/21/2018 12:27:24 AM*

***Note:** Cells with a grey background indicate data that has not yet been published. It is currently in a pre-approval state.*

*The information contained in this report is based on accepted national definitions and may not be the same as statistics published in WCB annual reports. This document should be read in conjunction with the "Preface to Accompany" Report.*
*Source: Association of Workers' Compensation Boards of Canada (AWCBC)*

Footnotes

1 Weighted average calculated as follows: The sum of the estimated jurisdictional assets divided by the sum of the total jurisdictional benefits liabilities for assessable employers ($M) (KSM #7) expressed as a percentage, where est. assets (in $M) are calculated by multiplying the total benefits liability for assessable employers ($M) (KSM #7) by the percentage funded (KSM #15).

2 The percentage funded for rate setting purposes is 114.5%. It corresponds to the ratio of assets to liabilities excluding latent occupational diseases yet to be reported.

| 2016 (Source: AWCBC Key Statistical Measures) | | Assessable Payroll (KSM 12) | Employer Cost (KSM 11 Total Premium Revenue; KSM 10 Que.) | WC benefits paid in year (KSM 5.1) | Employer cost per $100 payroll | Worker bene paid per $10 assessable p |
|---|---|---|---|---|---|---|
| | BC | $ 92,400,000,000 | $ 1,493,786,000 | $ 1,259,000,000 | $ 1.62 | $ |
| Canadian Neighbours | Alberta | $ 99,800,000,000 | $ 994,527,000 | $ 766,400,000 | $ 1.00 | $ |
| | Yukon | $ 1,100,000,000 | $ 20,700,000 | $ 14,300,000 | $ 1.88 | $ |
| | NWT/Nu | $ 2,900,000,000 | $ 56,900,000 | $ 36,000,000 | $ 1.96 | $ |
| Canadian Comparators | Ontario * | $ 171,600,000,000 | $ 4,858,000,000 | $ 2,252,000,000 | $ 2.83 | $ |
| | Saskatchewan | 20,900,000,000 | $ 281,800,000 | $ 204,100,000 | $ 1.35 | $ |
| | Manitoba | $ 18,200,000,000 | $ 256,900,000 | $ 156,800,000 | $ 1.41 | $ |
| | Quebec | $ 139,000,000,000 | $ 2,541,100,000 | $ 2,001,900,000 | $ 1.83 | $ |
| | New Brunswick | $ 8,800,000,000 | $ 212,700,000 | $ 142,800,000 | $ 2.42 | $ |

**Ontario benefits paid excludes $56M in loss of retirement income contributions and claim administration costs.*

| 2016 (Source: NASI Workers' Compensation Benefits, Costs and Coverage, Oct 2018) | | Assessable Payroll (US$) (Table 4) | Employer Cost (US$) (Sources & Methods) | WC benefits paid in year (US$) (Table 9) | Employer cost per $100 payroll | Worker bene paid per $10 assessable p |
|---|---|---|---|---|---|---|
| US Neighours | Washington | $ 184,150,000,000 | $ 3,076,809,000 | $ 2,430,746,000 | $ 1.67 | $ |
| | Idaho | $ 26,421,000,000 | $ 450,887,000 | $ 268,000,000 | $ 1.71 | $ |
| | Montana | $ 17,472,000,000 | $ 373,445,000 | $ 261,105,000 | $ 2.14 | $ |
| | Alaska | $ 16,316,000,000 | $ 381,974,000 | $ 227,630,000 | $ 2.34 | $ |

# Resources

The following resources were used in the preparation of this report:


Arthurs, H, *Funding Fairness: A Report On Ontario's Workplace Safety And Insurance System*, Queen's Printer Ontario, 2012

Association of Workers' Compensation Boards of Canada [AWCBC.org], *Summary Tables and Key Statistical Measures*

Burton, John F. Jr. [Chairman], *Report of the National Commission on State Workmen's Compensation Laws*, US Government July 1972

Dworsky, Michael and Nicholas Broten, *How Can Workers' Compensation Systems Promote Occupational Safety and Health? Stakeholder Views on Policy and Research Priorities.* Santa Monica, CA: RAND Corporation, 2018.

International Labour Office [ILO.org], *World Social Protection Report 2017-19: Universal social protection to achieve the Sustainable Development Goals.*

Ison, T, "Reflections on Workers' Compensation and Occupational Health & Safety" (2013) 26 *C.J.A.L.P*

National Academy of Social Insurance [NASI.org], *Workers' Compensation: Benefits, Costs, and Coverage, October 2018*

Royal Commission on Workers' Compensation in British Columbia, Gill, G.S [Chair],: *For the Common Good*, Queen's Printer, Victoria, BC 1999

Tanabe, Ramona P., *Workers' Compensation Laws as of January 1, 2016,* Workers' Compensation Research Institute [WCRInet.org],

WorkSafeBC, *Annual Report 2017 and Service Plan 2018-2020*

## Appendix 3

The link to the free Government of Canada course for Gender Based Analysis Plus (GBA+) with resources is available here: https://cfc-swc.gc.ca/gba-acs/index-en.html

**Proposed Terms of Reference for Workers' Compensation System Review**

Whereas the *Workers Compensation Act* (the Act) was born out of a compromise between BC's workers and employers in 1917, where workers gave up the right to sue their employers or fellow workers for injuries on the job in return for an employer funded no-fault insurance system;

And whereas the last comprehensive review of the Act took place in 2002, and the last significant amendments to the Act were made in 2002 and 2003;

And whereas there have been significant changes in workplaces, the economy and the workforce of British Columbia over the past 16 years;

And whereas the Premier's July 2017 mandate letter to the Minister of Labour includes the following direction:

> *Review and develop options with WorkSafeBC to increase compliance with employment laws and standards put in place to protect the lives and safety of workers.*

And whereas the Confidence and Supply Agreement from May 2017 contains the following commitment at Section 2 (d):

> *Improve fairness for workers, ensure balance in workplaces, and improve measures to protect the safety of workers at work so that everyone goes home safely and that workers and families are protected in cases of death or injury.*

And whereas the Minister has directed the chair of the Board of Directors of WorkSafeBC to effect a systemic culture shift to ensure the workers' compensation system is more "worker centred", that injured workers be treated with compassion, respect and dignity, and that increases confidence in the system;

And whereas the Minister has supported this systemic culture shift by:

- Refreshing the Board of Directors of WorkSafeBC, including a new chair.
- Clearly articulating the needed culture change within WorkSafeBC itself to improve services, with a focus on injured workers who need care, compassion and respect while they recover.
- Directing the WorkSafeBC Board to remind employers of their responsibilities and accountability to reduce workplace injuries and death under the Act and the *Occupational Health and Safety Regulation* (OSHR).
- Directing the WorkSafeBC Board to review its Rehabilitation and Claims Services policies to determine if there are policies that could be amended to ensure a worker-centred approach which resulted in a report published on April

25, 2018 by Paul Petrie entitled "Restoring the Balance: A Worker-Centred Approach to Workers' Compensation Policy". The report contains 41 recommendations for change which has led to the development of a workplan to engage interested stakeholders in a process to implement as many of the recommendations as possible. Stakeholder consultation is underway on the 2019-2021 workplan.

- Amending legislation (Bill 9-2018) to add a presumption for first responders who experience trauma as a result of their work and which results in a diagnosed mental health injury/disorder.
- Considering development of a regulation to expand coverage for the Bill 9 presumption to other occupations, including nurses and dispatchers (and call-takers) who support first responders.
- Directing the WorkSafeBC Board to prepare a report on the background and options available to WorkSafeBC under the WCA to manage the unappropriated balance in the Accident Fund.
- Leading a cross-ministry working group, with involvement and input from WorkSafeBC, to better protect people and the environment from the dangers of asbestos. A report for consultation and input was released December 19, 2018.
- Working to review how government, WorkSafeBC, and the Criminal Justice Branch should respond to serious injuries and fatalities of workers in light of Bill C-45 (2004).
- Working to support WorkSafeBC's implementation of a 5-year prevention strategy as part of its Strategic Plan to reduce workplace injury, disease and death and have BC become the safest jurisdiction in Canada for workers.

Now, therefore, the Minister directs that a review of the workers' compensation system be undertaken as follows:

1. Subject to further direction from the Minister of Labour, the review will assess the following specific issues:
   (a) The policy and practices used in the workers' compensation system relating to supporting injured workers return to work.
   (b) An evaluation of current WorkSafeBC policy and practices through a Gender-based Analysis Plus (GBA+) lens.
   (c) Modernizing WorkSafeBC's culture to reflect a worker-centric service delivery model. This model should incorporate a best practices, research-supported approach to managing physical and mental injuries caused by the workplace.
   (d) Recommendations dealing with issues related to the improved case management of injured workers.
   (e) What specific steps are required to increase confidence of workers and employers in the workers' compensation system, including but not limited to the Fair Practices Office, and in the other services provided by WorkSafeBC.

(f) Whether there are any other urgent compensation issues that were not addressed in the final report to the Board of Directors of WorkSafeBC on how to manage the unappropriated balance in the Accident Fund.

2. A report will be provided to the Minister by September 1, 2019 and may include recommendations for amendments to the Act.

3. The review will be undertaken by an individual (Janet Patterson) with expertise in the workers' compensation system, who is appointed by the Minister and who will approach the review in an independent, impartial, and balanced manner.

4. The funding for the review, including the reviewer's compensation, will come from WorkSafeBC and will be administered by the Minister of Labour. WorkSafeBC will provide administrative and research support to the review.

5. The reviewer will determine their own procedures, including the format for reporting out to the Minister and communications with stakeholders. It is expected that the review will engage in consultations with and receive submissions from interested employer and union/worker stakeholders from all regions of the province, including hearing from injured workers who choose to come forward to the reviewer. The reviewer will work with the Ministry to design the stakeholder consultation process.

6. The reviewer will provide a draft of the final report to the Minister of Labour to review and provide input on prior to finalizing the report. The Minister of Labour will make the final report public after a reasonable period of time to review and consider it.

Given under my hand this 4th day of March, 2019.

Honourable Harry Bains, Minister of Labour

| | |
|---|---|
| Fees: | $370,000 |
| Expenses: | $16,394.76 |
| Total: | $386,394.76 |