

EXECUTIVE SUMMARY

This Report “*New Directions: Report of the WCB Review 2019*” is the result of a “targeted” Review of the workers’ compensation system of British Columbia. The Review was conducted by Janet Patterson under Terms of Reference (TOR) provided by the Minister of Labour, the Honorable Harry Bains.

The Minister had already taken some steps towards ensuring that the Workers’ Compensation Board of B.C. or WorkSafeBC (Board) was “worker centred”. In 2018, the Minister requested a policy review (the “Petrie Report”) and review of the Board’s surplus (the “Boygo Report”). This Review was asked to assess how to modernize the Board’s culture, case management and return to work (RTW) practices to reflect a worker-centric service delivery model. The Review was also asked to recommend specific steps to improve the confidence of stakeholders, including but not limited to a Fair Practices Office and amendments to the *Workers Compensation Act* (“Act”). The Review was to look at these matters with a GBA+ lens and also ensure that there was outreach to Indigenous communities.

The Review consulted with the public and with stakeholders, as well as with Board management and staff, the Board of Directors and external experts. Public hearings were held throughout the province and over 200 presenters, mostly injured workers and their families, presented their recommendations. In addition, the Review received detailed submissions from all compensation stakeholders as well as almost 2,000 responses to its online questionnaire. One key stakeholder, the Employers’ Forum, withdrew from the second stage of consultations. The Report sets out this consultation process in detail.

The recommendations in this Report are drawn from this extensive consultation process.

The Review sets out a context for the Report:

- About 2,000 complaints a year are made about the Board to the Provincial Ombudsperson, MLAs and the Board’s Fair Practices Office. The complaints are made mostly, but not exclusively, by injured workers and include unfair Board practices, unfair Board decisions and a lack of respect in its treatment of injured workers. A number of complaints involve complex conditions or long-standing cases.
- Following the United Nations Declaration of the Rights of the Disabled, the biopsychosocial model of disability is now widely accepted. Disabled workers can often work and workplaces must take meaningful steps to accommodate those workers.
- The “best practices” RTW guidelines require a holistic and individualized approach, active participation of the injured individual, the involvement of an expert and collaboration between all of the parties.
- The nature of work has changed and many workers now experience precarious work in the gig economy.

This Review adopted the definition of a “worker-centred” approach used in the Petrie Report. A worker-centred approach is one which allows a consideration of individual circumstances and also fully seeks to maximize an injured worker’s recovery and restore their pre-employment status as much as possible. This definition draws on the principles of the Historic Compromise which is the foundation of the Canadian compensation system.

Assessment of Current Board Culture

Over the last years, the B.C. Board has moved to an “insurance” service delivery model to determine and deliver “entitlements”. On the front-line, Board decision-making is largely impersonal and policy driven. The decision-making culture is influenced by the case management system which embeds disability guidelines and timeframes into each claim file. The guidelines are based on diagnosis codes and impose a “one size fits all” framework with recovery and return to work milestones for each diagnosis. Workers with simple traumatic injuries, and those who follow a predicted path of recovery, are generally satisfied with this “cookie cutter” approach.

Board compensation decisions cannot be changed, after 75 days, except on appeal to the Review Division and then to the Workers Compensation Appeal Tribunal (WCAT). Both appeal bodies have limited jurisdiction. In general, the Board’s seeks to correct decisions through appeals and may be described as having an appeal-oriented culture.

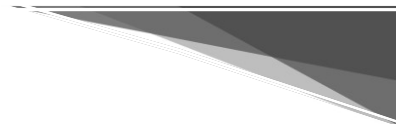
What We Heard

Through the Review consultation process, we heard that workers whose injuries or recover fell outside the “cookie cutter” guidelines, tended to have very negative compensation experiences and outcomes. This was particularly the experience of workers with serious or complex injuries, concussions, psychological injuries or occupational diseases. Such cases often had poor or no investigations, disregarded medical evidence or little communication with the worker before a decision was made. Workers repeatedly told the Review that they did not feel “heard” through an often adversarial compensation experience. Many reported being spoken to by case managers in hostile or dismissive ways and that they considered themselves abandoned or further injured by the compensation process. Many of these workers experienced financial hardship as a result.

Many workers had difficulty understanding the Board’s legalistic decision letters, especially if English was not their first language.

Many workers (and employers) felt that they could not navigate the appeal process without an advocate or lawyer’s assistance. Complex injuries often resulted in multiple decisions and a procedural complexity that defeated many.

In addition, many individuals, workers and employers, stated that they were not treated respectfully, that the Board was hard to communicate with and that the Board did not investigate or consider their evidence in decision-making. There appears to be almost no effective remedial avenues for stakeholders or individuals, especially injured workers.



Board decisions on medical issues were an area of particular conflict. Many felt that seriously injured workers were pre-maturely “plateaued” and forced back to work, only to experience re-injury or further disability. Both workers and employers are highly dissatisfied with the Board’s approach to Light Duties and the availability or reliability of medical evidence in such cases.

Shifting to a Worker-Centric Approach

A shift to a worker-centric delivery system must include treating all injured workers with dignity and offering effective RTW services for all stakeholders. This is an important goal especially for seriously injured workers whose work-caused injuries place a huge burden on individuals and their families. These are injured workers who are most in need of Board support and yet are, in effect, left behind by the current compensation system.

To make this shift, the Board requires improvement or change in three essential areas: communications, consideration of individual circumstances and evidence, and patient-centred medical care. The Review recommends:

1. That the Act be amended to include a Preamble and Statement of Purpose, as has been done in other jurisdictions. A statutory mandate inclusive of the principles of the Historic Compromise will assist the Board in making a cultural shift back to supporting all injured workers as an organizational goal.
2. Improved and Respectful Communications : That the Board improves its communications with all stakeholders through the use of email, plain English decision letters, and supported on-line multilingual services. It is recommended that the Act require the Board to establish a Code of Conduct for Fairness and Service to all stakeholders.
3. Improved Consideration of Individual Circumstances and Evidence: That the Act be amended to require that Board decisions be made on the “merits and justice” of the case, as is done in most other Canadian jurisdictions. Board policy should provide guidance on the use of embedded disability guidelines in this context and also for consistency in decision-making. A number of recommendations are made to improve internal Board processes for the collection and weighing of evidence including having individualized assessment and case management for concussion injuries. Policy should state that injuries from violence in the workplace cannot be dismissed as just being “part of the job” as this is not consistent with the principles of the Historic Compromise.
4. Improved Patient-Centred Medical Care: The medical model of “patient centred” care is the recommended model for revising the Board’s approach to health care services, to work towards the goal of maximum recovery for injured workers. Medical evidence must be accessible and credible and medical disputes resolved quickly, ideally through collaboration. Recommendations include:
 - Worker is treated by the caregiver of his/her choice. The carer delivers a treatment plan, minimally supervised by Clinical Services.

- Clinical Services is transferred out of its current role as adjudication support and re-established as a separate division, reporting to the CEO/Board of Directors. Clinical Services will consult with Doctors of BC on systemic medical issues.
- BMA's role within Clinical Services will be to consult and collaborate with treating physicians, claim owners and stakeholders where recovery or treatments are diverging from norms or Light Duty issues arise. BMA's will not be involved in provided opinions on adjudicative matters.
- Medical disputes will be addressed informally first, and if needed referred to the Medical Service Office for a case conference or an Independent Medical Examination (IME).

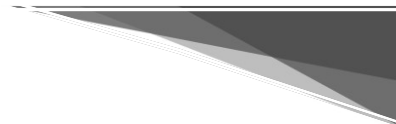
Changing the Service Culture to Be Fair and Accessible

One of the most common complaints was the complexity of the system. A complex claim could generate multiple appeals and procedural complexity spanning years. The courts have commented that the system was “unwieldy, inefficient and cumbersome”, creating a “treadmill” of appeals and doing little to advance a worker’s access to justice. The Review again found that certain types of injuries fared the worst, and that procedural complexity combined with adversity, delay and financial hardship created a “toxic dose” which often increased a worker’s disability.

This appeal-oriented system of resolving disputes is also not compatible with RTW best practices.

The Review recommends that :

- Sections 96(2) and 96(5) of the Act be amended to allow the Board flexibility to reconsider and reopen its own decisions, as is done in other Canadian jurisdictions. As noted by the Provincial Ombudsperson in 2010 and again in 2019, section 96(2) in its present form, is administratively unfair.
- That the Review Division have wide jurisdiction to correct decisions.
- That a number of case management issues be addressed including incomplete decision making.
- That the Act be amended to provide WCAT with the statutory authority to reconsider its own decisions;
- That the Act be amended to provide WCAT with jurisdiction over issues involving the Charter and the Human Rights Code, consistent with the Review Division and a 90 day time limit, also consistent with the time limit to the Review Division.
- That interest be paid to workers for certain types of retroactive benefits.



Return to Work and Vocational Rehabilitation Issues

The Report recommends that the Board adopt recognized “best practices” RTW guidelines, principles and guidelines, especially for Light Duties.

Other recommendations for an improved RTW processes include:

- Provide support for employers to conduct accommodation assessments through NIDMAR;
- Establish a process for the Board to recognize established disability management programs;
- Amend the Act to recognize the employer’s Duty to Accommodate (DTA) based on the experiences and language of other jurisdictions;
- Establish training for Board staff on DTA and disability management
- Amend the Act to provide for a specialized appeal process for DTA issues

The Report also makes recommendations for Vocational Rehabilitation (VR):

- Amend section 16 of the Act to provide a clear statutory mandate for VR
- Amend Board policy to provide for flexibility in VR plans
- Amend the Act so VR decisions are appealable to WCAT
- Initiate VR specialized programs/resources for immigrants, older workers and younger workers

Specific Steps to Increase Stakeholder Confidence

Given this Review, the Report considers that the following steps are critical to increase stakeholder confidence and provides detailed recommendations regarding each step.

1. That a Fair Practices Commission (FPC) be created, independent of the Board and with ombudsperson authority and resources to address both individual complaints and systemic issues. Due to the high level of complaints, it is also recommended that two Deputy Commissioners be appointed, one for Claims matters and one for Prevention and Assessment matters.
2. That a Medical Services Office (MSO) be created to provide medical services to both stakeholders and decision-makers in the system, on request. This would include non-binding medical case conferences and arranging Independent Medical Exams (IMEs) from a roster of approved physicians, replacing the IHP process at WCAT.
3. That the Act be amended to provide a more accessible process for reviewing Board policy, consistent with the supervisory powers of the court. If the WCAT Chair reviews a policy, the WCAT determination may be reviewed by court through a judicial review. If the WCAT Chair determines that a Board policy is not consistent with the Act, the Board as well as the parties will have standing to appeal the matter to court.



4. That Board governance be balanced and fair and be seen to be so. It is recommended that the Board governance structure be changed to reflect the stakeholders in the Historic Compromise, as do most other jurisdictions, using the Manitoba model of 3 employer representatives, 3 worker representatives, and 3 public interest representatives with a neutral Chair. The Review also recommends that the directors of the Employers' Advisers Office (EAO) and Workers' Advisers Office (WAO) be included in the BOD as non-voting members as well.
5. Other steps for improving confidence include a review at least every 5 years, and that it include stakeholder consultation and public engagement, inclusive of injured workers. Also, that the Board develop an Education Office, an Occupational Disease Advisory Committee and that both the Board and FPO support community navigators.

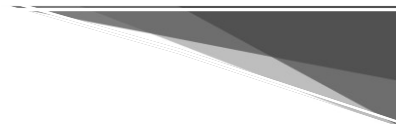
Other Urgent Issues

Certain issues were identified in the public consultation process as being urgent in the compensation system. The Review address some, but not all, of the raised issues.

1. Re Activity Related Soft Tissue Disorders (ASTDs). B.C. is alone in treating gradual onset musculoskeletal injuries (MSIs) in arms, shoulders and hands as an Occupational Disease under section 6 of the Act. This approach creates a significant barrier to the acceptance of these very common workplace injuries. Further, this barrier adversely affects women more than men. In 2017, the ASTD acceptance rate was about 60% for men and about 35% for women. This adverse impact is likely due to the gendered nature of computer work. The Board practice with ASTD adjudication is strongly resistant to accepting that repetitive computer use can be a cause of an MSI in arms or hands. In 2017, only 19 claims for computer-related ASTDs were accepted. Other jurisdictions approach these conditions as gradual onset injuries which are more easily accepted, treated and prevented.

The Review recommends that the Act be amended to specify that these MSIs be treated as personal injuries under section 5 of the Act. Board policy should then provide for an integration of the MSI Prevention guidelines into compensation policy and practice, that ASTD's now in Schedule B have an equivalent presumption and that the Board have stakeholder consultations re additional presumptions which may be necessary for some conditions in some occupations.

2. RE Psychological Injuries It is recommended that section 5.1 of the Act, now termed "Mental Disorders" be renamed "Psychological Injuries" and that a short-term psychological injury could be accepted without a DSM diagnosis for up to 10 days. It is also recommended that the word "predominately" be removed from section 5.1(a) (ii) and that 5.1(c) be amended to confine the "labour relations exclusion" in certain respects. It is also recommended that section 5.1(1.1) of the Act, providing a presumption of work causation for traumatic psychological injuries, be amended to include all occupations.



3. CPP Offset Another urgent issue from the consultations was the removal of the CPP deduction from the Act. This provision affects the most severely injured workers, who meet the “severe and prolonged” criteria for CPP disability and who have already had significant losses due their disability. They are among the most disabled and financially affected workers and the most deserving of full Board support.
4. Chronic Pain It is recommended that the new ICD-11 classification for chronic pain be included in the current Policy Review and that the new chronic pain policy provide for an individualized assessment of permanent impairment.

The Review made no recommendations regarding some other urgent issues raised in the consultation. The most common issue that was raised by permanently injured workers, particularly those with severe injuries, was to ask that permanent functional impairments (PFIs) be for life because their injuries were “for life”. However, this matter is outside of the Review mandate as it was covered in another report (the “Boygo Report”).

Other urgent issues were raised, but they require more data, research and consultation than was available in this Review. The Report recommends that the Board form Task Forces to address these two urgent issues by initiating the following:

1. Gathering data on the loss of earning capacity for permanently injured individuals and assess and make recommendations regarding the methods of compensation for permanent disability under section 23 of the Act; and
2. Investigating and costing the development of a workers’ system of medical clinics in B.C. similar to the Occupational Health Clinics for Ontario Workers.

Indigenous Consultation

The Review was also asked to encourage participation from Indigenous stakeholders. Based on presentations to the Review, it is recommended that the Board engage community navigators and develop special guidelines for VR services to Indigenous communities, taking their perspectives and the Truth and Reconciliation Commission (TRC) recommendations into account.

It was noted that workers who are injured while working for a Band, have their injuries accepted at less than half of the general accepted rate. This is an area which needs further attention.



GBA+ Review

A GBA+ lens was used throughout the Review. In addition, certain matters were the focus in this area and the following was recommended:

1. That the Act be amended to provide discretion to the determination of Average Earnings for young, casual and temporary workers'
2. That the Board develop policy and procedures to address gender and identity based discrimination and ensure a psychologically safe workplace.
3. That the Board do gender based risk assessment for RTW and develop specialized responses to reports of violent sexual assault .
4. That the Board offer specialized support to workers with cognitive impairments and temporary foreign workers and farmworkers.

Summary

The Review involved a level of public engagement around workers' compensation which has not been seen for several decades. It paints an important picture of stakeholder concerns and levels of confidence which I have set out in detail in this Report.

The Review's recommendations focus on shifting the Board culture to a worker-centric system, so that the Board can perform its modern role in RTW and at the same time treat injured workers with the respect and dignity that they deserve. An independent Fair Practices Commission will monitor this situation and provide an Annual Report to the Minister.