

CHANGES TO THE BC WORKERS'
COMPENSATION SYSTEM 2002 - 2008

**THE IMPACT ON
INJURED WORKERS**

**ADDING
INSULT TO
INJURY**

A Summary Report to the
B.C. Federation of Labour
APRIL 22, 2009

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Changes to the BC Workers' Compensation System (2002-2008): The Impact on Injured Workers

*A Report to the B.C.
Federation of
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EXECUTIVE SUMMARY

In 2002, major changes began to be made to the laws and policies that govern the workers' compensation system in British Columbia. Those changes were initiated by the Liberal government after an aggressive lobbying effort by employers. The employer lobby advanced the inaccurate view that the system had become economically unsustainable. The resulting changes were based upon no discernable principle other than that of reducing costs for employers. In that regard, the changes were very successful. But these changes have come at a profound cost to workers and to the treatment and benefits that injured workers receive under the compensation system.

The combination of the 2002 legislative amendments, ongoing policy revision, and structural change have resulted in the following changes to the BC Workers' Compensation Board (WCB) and to compensation benefits for injured workers:

- the effective elimination of pensions based on the actual long-term loss of earnings of injured workers;
- the effective elimination of vocational rehabilitation assistance that helps injured workers return to the work force;
- appeal processes have become increasingly technical, difficult to understand and inaccessible to injured workers;
- functional pensions are now payable only to age 65 rather than payable for life;
- benefit rates have been reduced from 75 percent of gross income to 90 percent of net income, resulting in a reduction of benefits by 13 percent;
- concentration of power in the Board of Directors, including delegation of power to enact binding policy

and the removal of discretion in decision-making processes;

- the reduction of Consumer Price Index (“CPI”) to the rate of CPI increases *less one percent* and to a cap of four percent in any year, and calculated only once yearly rather than twice;
- restrictions on the manner of determining a worker’s wage rate, primarily to earnings in 12 months prior to injury instead of a flexible or discretionary method;
- wage rate determinations early in a claim, leaving errors that can’t be corrected and are applied later to pensions;
- significant new restrictions on compensation for verified psychological injuries;
- restrictions on compensation for permanent chronic pain and similar conditions;
- inadequacy of functional pensions as they are based on an outdated Permanent Disability Evaluation Schedule (“PDES”) and no review of the PDES schedule has been undertaken; and
- restriction of the Board’s remedial jurisdiction i.e., no ability to review and re-adjudicate prior decisions even if erroneous or to reopen claims where changed circumstances.

The most extreme consequences for injured workers are the effective elimination of *loss of earnings pensions* and the virtual elimination of *vocational rehabilitation* services. This has had a profoundly negative economic impact on thousands of permanently injured workers and their families.

Overall, the WCB has shifted its focus from addressing circumstances of injured workers and instead is focussed on cost

reduction for employers, and the removal of important discretionary decision-making has been fundamental to allowing the WCB as an institution to effect this change.

The WCB needs to return to a principled and effective compensation system that responds to the needs of injured workers.

The authors call on the provincial government to amend the **Workers Compensation Act** to address the needs of injured workers, including:

- reinstate a dual system of pensions for permanently injured workers so a *loss of earnings pension* is awarded when the injured worker experiences a greater loss than recognized by a *permanent impairment pension*;
- provide for lifetime functional pensions;
- recognize that cumulative mental stress and psychological disability are work injuries;
- provide that chronic pain is assessed and compensated like other workplace disabilities; and
- Restore fair discretionary decision-making at the WCB.

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FORWARD

This paper was written for the B.C. Federation of Labour by a group of senior compensation lawyers and advocates who have represented workers and unions for many years. The Report was written by Stan Guenther, Janet Patterson, and Sarah O’Leary with assistance from Jim Sayre and Jim Parker and with the support of their respective firms and employers (including Health Sciences Association (HSA), B.C. Nurses Union (BCNU), Community Legal Assistance Society, and Rush Crane Guenther). There was also assistance and commentary from many other advocates.

The changes that are the subject of this paper followed amendments to the **Workers Compensation Act** in 2002 - **Bills 49** and **63**, the **Workers Compensation Amendment Act (No. 1 and No.2)**. The purpose of this report is to assess and report on the impact of these changes on injured workers.

Since the changes have been extremely negative, we have often been asked whether it is time for labour to depart from the “historic compromise” underlying the compensation system. Our view is that the compensation system is an important benefit for injured workers – financial, vocational and medical. It is also an important part of the regulation of safety in the workplace. As such, it is worth understanding and defending.

Nonetheless, there is no doubt that in BC the compensation system has been seriously undermined by the changes since 2002. In this Report, we try to identify these key changes and the nature of their impact on injured workers. However, we also attempt to restate the fundamental principles of a modern compensation system and provide key recommendations for restoring a balanced and socially valuable system.

We understand that at the highest levels, the goal of cost reduction has resulted in legislation and Board policy that has been used to confine or eliminate the discretion of individual Board decision-makers.

We dedicate this Report to the injured workers who have stepped forward to provide their stories, the unions that

have supported these difficult claims and to the workers' compensation advocates who deal with the daily frustrations of working in a system that has become more and more inaccessible, ineffective and unfair: an insult to injured workers.

INTRODUCTION

The establishment of workers' compensation systems at the turn of the 20th century is often referred to as the "historic compromise," where workers surrendered their right to sue employers for workplace injuries in return for guaranteed no-fault compensation, while employers undertook the costs of operation of the system in return for immunity from lawsuit.

It is not clear, however, that this "historic trade-off" ever represented any actual agreement between industry and labour. It probably represented the imposition by government of a legislative scheme more for the economic protection of employers than social justice for injured workers. Whatever the true political motivation, there were clear benefits for both workers and employers.

Since 1917, there have been numerous changes and amendments to the legislation as a result of the prevailing political views of the government of the day rather than the consequence of some historic contractual relationship between labour and industry. Recognition of this political role is important because it highlights political accountability. At the same time, it minimizes reliance on conditions and relations as they existed more than a century ago to rationalize reductions of benefits now.

In BC, employers have publicly complained about the costs of workers' compensation over the years, but the rallying cry reached a peak in the late 1990s and early 2000s with employers' claims that the compensation system had become "unsustainable" and would no longer be economically viable if drastic changes were not made.

Fresh from its overwhelming 2001 electoral victory, the Liberal government moved to respond. The government commissioned Alan Winter, an employer-side compensation lawyer, to conduct a review of the compensation side of the "WCB". His report, the *Core Services Review of the Workers' Compensation System* (the "Winter Report") was published in March 2002 and his recommendations were the basis for many of the subsequent amendments.

In 2002 and 2003, the **Workers Compensation Act** was amended by **Bills 49** and **63**, the **Workers Compensation Amendment Act (No.1 and No.2)**. We have been asked to describe the changes that have occurred in British Columbia's workers' compensation system since these amendments, the impact of those changes on injured workers, and the changes to the system that we now feel are necessary and desirable. In doing so, we have not been able to address other important areas such as prevention, governance, occupational disease, or the regulation of occupational health and safety, issues nonetheless also demanding further careful consideration.

The changes that are the subject of this paper were initiated by the Winter Report and the amendments to the **Act** by **Bill 49** and **Bill 63**. However, the changes have been profound and extensive, far beyond what was recommended by Winter and beyond what was initially expected by workers from initial review of the legislative amendments.

In our view, one amendment was the key to these profound changes. In 2002, the **Act** was changed to give the politically appointed Board of Directors the power to make policy which was binding, in law, on all decision-makers at the WCB and in the appeal system.

The elevation of WCB policies to binding status has had the effect of making the WCB Board of Directors the equivalent of legislator. After the **Act** was passed, the WCB began an active process of policy revision that continues to this day. These legislative and policy changes have, in our view, been dramatic and almost universally detrimental to injured workers. The policy changes have been particularly devastating for those rendered unable to return to their former jobs as a result of permanent disabilities.

While compensation benefits for temporary disabilities were significantly reduced, as were a range of other benefits that we address in this Report, some of the most severe impacts have arisen from the reductions in long-term benefits for compensable permanent disabilities. Whereas permanent pensions had previously been payable for life and indexed by the CPI increases, since 2002, they have been payable only to age 65 and indexed by one percent less than CPI with a cap of four percent.

More importantly, while permanent pensions were previously based on the greater of the disabled worker's reduction of earning capacity and actual loss of earnings, since 2002, the combined changes to law and WCB policy have almost completely removed the availability of pensions based on actual loss of earnings, even in cases where permanently disabled workers have been rendered unable to return to their former jobs.

WCB decision-making and appeal processes have also become increasingly unfriendly and inaccessible to workers.

For injured workers, these changes have not only substantially reduced entitlements and benefits, but have added further insult to injury.

PRINCIPLES OF WORKERS COMPENSATION

(a) General Principles

In our view, any assessment of the changes which have taken place or which should now take place must be within a context of principles that are fundamental to a modern workers' compensation regime.

There is little dispute that the workers' compensation scheme is based on several basic principles: compensation should be paid to injured workers without regard to fault; there should be security of payment of compensation; administration of the scheme and adjudication of claims should be handled by an independent commission; and, compensation should be provided quickly and without court proceedings.

Similarly, there seems little contention about the proposition that the foundations of the modern workers' compensation system are the compensation and rehabilitation of injured workers and the prevention of workplace injuries generally. The scheme was originally conceived on the basis of the need for compensation of injured workers and there can be little doubt that the prevention of injuries by making workplaces safer is an equally compelling goal.

We think it fair to say that compensation, rehabilitation and prevention are of equal and fundamental importance.

Other principles have been more contentious and subject to revision over time, as described below.

(b) Level of Compensation: “Full” vs. “Fair” Compensation

It is clear that the purpose of the 2002 amendments was to reduce the cost of compensation claims on the WCB Accident Fund. The Accident Fund is 100 percent funded by employers. When Winter reviewed the system, he echoed employer concerns by introducing the issue of employer cost as a key consideration, but articulated a basis for change which would involve a “balancing of interests” between workers and employers. As Winter put it:

“...the level of entitlement for workers must be balanced against the costs to employers of funding the system. In my opinion, there is only so much which the system can reasonably expect employers to pay through assessments to the Accident Fund.”

Full compensation for lost earnings had been the accepted norm in BC for many years, apparently reflecting the political will of successive governments and more importantly, reflecting the collective social and economic conscience.

In Winter’s view; however, it was legitimate to depart from the principle of “full compensation” on the basis that employers should be expected to fund only some lesser level. Winter termed this lesser level “fair” compensation.

Following this approach, Winter revisited existing benefit structures and recommended the reduction of various entitlements primarily on the basis of their cost to employers. The impact of this approach is seen most clearly in his recommendations that compensation payments be set at only 90 percent of a worker’s average net earnings and that the cost of living indexing of such payments should be reduced to CPI

increases less one percent (and with a cap of four percent if CPI increases were greater).

He also presented the “cost” issue as a public interest concern for the “sustainability” of the compensation system itself. For example, in a later decision reviewing the revised loss of earnings pension policy, the new Chair of the Workers Compensation Appeal Tribunal (WCAT), Jill Callan, stated:

“It is absolutely clear from the Core Review and the legislative debates that the amendments to section 23(3) and the addition of sections 23(3.1) and 23 (3.2) resulted from concerns that the financial viability of the British Columbia workers’ compensation system was at stake.”

There are two answers to those assertions:

1. There is nothing wrong (and much right) with requiring employers, as has always been the case, to fully fund the costs of the workers’ compensation system. The cost of the system is in large part the cost of the earning losses suffered by workers as a result of occupational injury and disease. The power to make and maintain a safe workplace lies in the hands of employers. Making employers responsible for the full cost of such losses can only create a powerful economic incentive to make workplaces safer. Employers’ complaints that “it costs too much” should simply no longer be enough to justify reduction of the standard of living of injured workers and their families.
2. The system was not teetering on the brink of collapse. The average assessment rates charged to employers to pay for the compensation system had fallen by over 22 percent from 1996 to 2001, to the lowest average rate in over ten years. Nor does there appear to have ever been any convincing evidence that requiring increased contributions from employers to reduce the WCB’s deficit on an ongoing basis would have brought business to its knees. Winter projected looming deficits (\$286 million in 2001; \$422 million in 2002), yet those projections were not borne out (the WCB recorded a surplus of \$424 million in 2001, and a deficit of only \$146 million in 2002). The assertion that the system was “unsustainable” was a myth.

However, the myth was successful in several respects. First, it cloaked the fact that the “system” is funded by employers, not taxpayers, and that there are strong policy reasons why employers can and should pay for workplace injuries. Second, it refocused the compensation debate on the costs of compensation rather than on the compensation needs of injured workers. It was successful also in driving the changes that have in only six years resulted in huge surpluses in the WCB’s budget (\$474 million in 2005; \$987 million in 2006) and huge reductions in the average assessment rates charged to employers (estimated at 1.56 percent of payroll in 2008, down from 2.29 percent in 1996, and now at the lowest level in more than 25 years), at the expense of compensation to injured workers.

For a review of the relevant statistics and economics, see *Appendix B*.

There is one other, less reputable, argument still made in favour of reduced benefits, that to fully compensate injured workers for their economic loss creates a “moral hazard,” an incentive to malingering and a disincentive to early return to work. Our common experience in representing injured workers over the years contradicts the stereotype, and is that the vast majority are genuinely motivated to recover from injuries and to resume their usual employment as quickly as possible. It is doubtful that the “moral hazard” theory was ever based on anything other than a stereotypical and false view of the motivations of injured workers, and certainly is in contemporary times unsupported by either anecdotal or scientific evidence. The stereotype should be thoroughly and completely debunked: it is anachronistic, patronizing and offensive to injured workers and the working community generally.

The compensation system should remain as it has always been, a no-fault system of compensation, funded by employers, to compensate workers for workplace injuries. The myth of unsustainability reflects only a continuing reluctance by employers to pay assessments to the level that the Accident Fund requires.

It is time to assert that at the heart of a modern workers’ compensation system must lie the principle that workers should be fully compensated for their economic loss due to a workplace injury. While less than full compensation may have been

available in earlier times, full compensation has certainly been the norm in British Columbia for many years. Times have changed in the last century, as have concepts of social conscience.

Anything less than employer funding to the level of “full compensation” shifts the economic cost of workplace injury to workers, and to the public system. The denial of full compensation impoverishes workers and also removes the financial incentive for employers to provide safer workplaces, yet employers still retain blanket immunity from being sued for workplace injuries and diseases.

In our view, the debate should no longer be whether workers’ compensation should be based on full earnings loss compensation, but whether there is any reasonable modern justification to undermine that principle. The only fair compensation is full compensation.

c) The Scope of Coverage: Compensation for All Workplace Disabilities

A related question is whether any injury or disease that is caused by work should be excluded from compensation. Since 2002, there have been a number of developments to reduce compensation for certain conditions.

In the 2002 changes, some psychological conditions were excluded by statute, including Post-Traumatic Stress Disorder (PTSD), when it arose from cumulative traumas, rather than from a single incident. Then, the WCB began a series of policy and practice changes to restrict acceptance of other work caused conditions. For example, the WCB passed practice directives for repetitive strain injuries, setting unrealistically high standards which had to be met before the WCB would accept that these injuries were caused by work. Compensation for chronic pain and related pain disorders has been severely limited. The WCB also began limiting how it defined and measured “disability,” requiring “objective impairment” and in effect, excluding a range of “invisible” disabilities from compensation. Again, in excluding conditions from coverage, the government and the WCB are pursuing cost reduction as a primary principle.

Mr. Justice Tysoe in his 1966 Royal Commission Report concluded that “to provide compensation for all work-caused injuries and disabilities is in accord with that [developing social] conscience as it is today.” Winter, in 2002, echoed that concern, stating that exclusion of benefits for psychological impairment arising gradually over time “would be inconsistent with one of the fundamental principles which led to the establishment of the workers’ compensation system, as reflected in the ‘historic compromise’ – the entitlement for a worker to receive compensation benefits for a disability which is ‘truly work-caused’.”

The Courts also have weighed in on the issue and found that the attempt by workers’ compensation boards in various jurisdictions to limit benefits for certain conditions, such as chronic pain, contravened the equality rights provision of section 15 of the *Canadian Charter of Rights and Freedoms* stating that differential treatment on the basis of the type of disability is discriminatory.

That analysis is not significantly different than would be required under British Columbia’s own ***Human Rights Code***.

The principle of entitlement that emerges is that any modern workers’ compensation system should cover all work-caused injuries without differential and discriminatory treatment for any particular kind of injury or disability. This principle is of growing importance, given the emergence of the “invisible” disabilities arising from changing workplaces and conditions, such as chronic stress conditions (physical and mental), chronic pain and related disabilities, and modern occupational diseases.

(d) Redefining Disability

We have identified a growing trend in the WCB to confine the extent of recognition of disability, with a corresponding reduction of benefits. The WCB has come to determine an injured worker’s employability through definition of “limitations” (those activities that the injured worker cannot physically perform) and “restrictions” (those activities that are medically proscribed as ones that would further injure the worker). The effect is most pervasive in the area of chronic pain: the WCB considers that pain results in no limitations (pain does not render an activity impossible to perform) and no restrictions (performing a painful

activity does not cause further injury). As a result, pain is not accepted as an obstacle to employment. The impediments caused by pain, such as reduced tolerance, stress, fatigue, or weakness are not taken into account. The WCB requires “objective” evidence of disability, and discounts the “subjective” experience of the worker.

Under the current **Act**, disability is undefined, but disability from earning income is the precondition to benefits. Workers should be entitled to benefits where their compensable disabilities have diminished their earning capacity. In our view, a fair assessment of a work-caused disability must take into account all of the consequences of the injury on a worker’s earning capacity and give due consideration to the worker’s own experience.

(e) Accessibility

Our concerns extend beyond the cuts to entitlements and benefits and to the decision-making and appeal processes now in place. Our experience with the workers’ compensation system in BC is that dignity and respect are all too frequently lacking, and more so in recent years.

The recent changes to law and policy have all too often resulted in an increasing culture of denial in the decision-making and appeal processes. At times, the decision-making appears to involve more of a search for impediments to claims than evidence-based decision making. Also, the changes to law, policy and practice have made decision-making technical and narrow, resulting in the fragmentation of issues on a claim. While appeals on individual issues may be quicker now, the number of appeals required on any claim result in a protracted process. We also see a growing reluctance at the adjudication level to implement appeal decisions. This contributes to a “revolving door” from which workers seem unable to escape. Overall, these changes to law and policy have made the WCB process difficult for the injured worker to understand and even more difficult to navigate.

PRINCIPLES OF COMPENSATION

We endorse the following principles as fundamental to any modern workers' compensation scheme:

1. Entitlement to compensation for workplace injuries is regardless of fault;
2. Security and speed of payment of compensation benefits without need for court process;
3. The adjudication and administration of a compensation system is independent;
4. All costs of a compensation system is borne by employers;
5. Compensation and rehabilitation of injured workers, along with the prevention of workplace injury, are the foundations of a modern workers' compensation system;
6. Injured workers and their dependents are entitled to full compensation for loss of earnings and earning capacity caused or significantly contributed to by any work-caused injury, condition or disease;
7. Entitlement to and determination of benefits are with full and fair assessment based on the worker's circumstances, consistent with the principles of the *Charter* and human rights legislation;
8. A worker is entitled to benefits where that worker's compensable disability has diminished his or her earnings or earning capacity, taking into account all of the consequences of those injuries and all of the worker's own circumstances. The worker's own evidence of those consequences and circumstances must be given due consideration; and
9. Injured workers are entitled to be treated with dignity and respect throughout their dealing with the decision-making and

appeal processes of the compensation system, and such processes are readily accessible and easily understood by workers. Decision-making and appeal processes focus on evidence-based decision making, and the appeal process provides ready and comprehensive correction of errors.

These principles are at the heart of our discussions in this paper.

SECTION I: COMPENSATION BENEFITS AFTER 2002

This section does not attempt to provide a complete summary of all the reductions in workers' compensation benefits since 2002. The effort to reduce costs is ongoing and at every level. However, we will identify the main areas and methods by which worker's claims are denied or if accepted, their benefits reduced.

A brief introduction to workers' compensation terminology provides a framework for this discussion.

- 1. *Temporary Disability:*** *In the initial stages after an injury, a worker is usually considered temporarily disabled, with an expectation that the medical condition will improve. During this period, the worker is paid wage loss benefits based on his or her wage rate, an earnings rate intended to represent the worker's earning capacity. Temporary wage loss is supposed to act as wage loss replacement while the worker recovers.*
- 2. *Plateau Date:*** *At the point when the worker's medical condition has stabilized, the worker is considered to have reached a "plateau". At this stage, the WCB terminates the worker's temporary wage loss and decides whether the worker is left with a permanent injury and if the worker can return to work. This is a particularly difficult time for workers. The WCB's pension decision can take months and if there are no vocational rehabilitation benefits, the worker is usually without compensation support. Besides the sudden loss of financial support and the uncertainty of a pension, the permanently injured worker faces the loss or reduction of future ability to work.*

3. **Permanent Disability:** *If a compensable injury leaves a worker with a permanent disability, the worker is assessed for a pension as long-term compensation.*

4. **WCB Pension:** *A WCB pension is an amount which is paid to a permanently disabled worker, usually on a monthly basis. If the pension is small, it may be paid as a lump sum at the time it is awarded. There are two kinds of pensions – a Permanent Functional Impairment (PFI) pension and a Loss of Earnings (LOE) pension. Prior to 2002, every permanently injured worker was assessed for both types of pensions and awarded the higher of the two. This was known as the Dual System. After 2002, all permanently disabled workers were assessed for a PFI pension, but only a few workers were assessed for LOE pensions because of changes in law and policy.*

5. **Wage Rate:** *In every claim, the WCB looks at a worker's "average earnings" and sets a wage rate for the worker's claim on this basis. Typically, the wage rate is based on the worker's earnings for one year prior to the injury up to a capped maximum amount, set by the **Act**. There are two wage rates set - an initial wage rate and then a long-term wage rate. The wage rate is the basis for the calculation of all WCB benefits on that worker's claim file, including pensions.*

WAGE RATES

In 2002, the wage rate section of the **Act** (Section 33) was amended to change the base wage rate and to limit the WCB's discretion to take fairness into account when calculating the rate. After the **Act** was amended, the WCB created policy that further reduced the results of wage rate determinations, particularly for certain groups of workers. The wage rate changes were premised on the principle that workers are not entitled to be compensated for their full economic loss when they are injured at work.

(a) Wage Rate Redefined: 75% Gross to 90% Net:

Workers used to receive wage loss benefits that were equal to 75 percent of gross pre-injury wages. This was considered to be full compensation as taxes are not deducted from WCB benefits and

thus the 25 percent reduction from gross would roughly equal pre-injury net wages. The new legislation reduces wage loss benefits to 90 percent of net pre-injury wages (the gross income on which benefits are based cannot, in any event, exceed the statutory maximum, which in 2009 will be \$68,500 per year). The resulting reduction of wage loss under the pre-2002 and the current systems is about 13 percent.

(b) Consumer Price Indexing:

While benefits used to be adjusted every six months to reflect any increases in the CPI, they are now adjusted once per year to an amount *1 percent below* the CPI. In any event, no matter how much the cost of living may have gone up, no injured worker can receive more than a four percent annual increase. There is simply no justification to reduce indexing of benefits to permanently disabled workers to *below the cost of living* and then to allow them to slip further behind every year. The sole rationalization for this measure is to reduce employer costs. The cost to workers who must live on this reduced income (often well below their own income already due to the WCB maximum) is never considered, and the most severe effect will be borne by seriously injured younger workers whose benefits will significantly erode over their lifetime.

(c) Flexibility and Fairness in Wage Rate Determination:

Further erosions of workers' benefits occur with new legislation and policy which limit the flexibility of case managers to set fair wage rates to reflect the worker's actual earning capacity. The new **Act** imposes a rigid set of rules that allow very little room to consider the worker's individual circumstances. This is particularly the case for seasonal or casual workers or workers with an irregular earnings pattern in the 12 months prior to injury. A fixed formula for setting wage rates is now applied, primarily based on the earnings of the worker in the 12 months prior to injury, with only very limited exceptions. Rigid and narrow legislation is then made worse by even more restrictive policy.

(d) Timing of a Long-Term Wage Rate Determination:

Permanently injured workers used to have their pension wage-rates set as part of the pension decision, at a time well along the claim process, when the worker and the WCB understood that this was the wage rate for the worker's lifetime. Law and policy have now changed to require setting the long-term wage rate after only ten weeks, at a time when the worker is more focused on recovery and short term considerations and often unaware of the long-term consequences. As a result, many injured workers do not appeal an incorrectly low wage rate. Even a grossly erroneous wage rate cannot be corrected later.

RECOMMENDATIONS FOR WAGE RATES:

- *Amend the **Workers Compensation Act** to base all benefits on 100 percent of net earnings.*
- *Amend the **Workers Compensation Act** to adjust benefits according to the Consumer Price Index every 6 months.*
- *Amend the **Workers Compensation Act** to provide for flexible establishment of wage rates that fairly reflect an injured worker's earning capacity and actual economic loss.*
- *Amend the **Workers Compensation Act** to ensure that the long-term wage rate on a claim can be reconsidered or appealed at the time of any permanent pension decision.*

PSYCHOLOGICAL INJURIES

In 2002, a new provision, Section 5.1, was added to the **Act** which specifically limits benefits for "mental stress." This provision deals with psychological injuries sustained by people in the course of their employment, including Post Traumatic Stress Disorder (PTSD), depression, anxiety disorder or any diagnosed psychological condition resulting from harm at work. The term "mental stress" effectively belittles the nature of psychological injury, suggesting that it is temporary and minor.

As many workers know, psychological injuries can be severe, disabling and permanent. They can ruin the lives of injured workers and their families with just as much devastation as any physical injury.

The 2002 amendment limited compensation for psychological injuries to very restricted situations where the “single” event which caused them was “sudden,” “unexpected” and “traumatic.” In this way, front line emergency workers such as firefighters, ambulance and health care workers and police officers can be denied compensation for psychological injury because of a view that the traumatic events they experience in their line of work are not “unexpected.”

The legislation was also deliberately drafted to exclude from coverage those psychological injuries caused by cumulative or repeated traumas. Medical experts have expressly stated that cumulative psychological injury is just as common, if not more so, than injuries caused by a single event. In BC prior to 2002, psychological disability caused by cumulative trauma or arising gradually over time could be adjudicated as compensable. In Ontario, there is specific policy to provide for coverage of psychological injuries from cumulative trauma.

The wording of this amendment invites a very restricted interpretation and certainly the appeal bodies have treated it as a very narrow door. Psychiatrists confirm that some people may be more traumatized by one particular event than another. However, the WCB and often WCAT will apply an objective standard to decide whether a triggering event was “traumatic” rather than asking if the particular worker was traumatized and injured by the event. For example, a paramedic who develops PTSD after attending an accident which reminded her of her own son’s fatal accident had her claim denied on the basis that the triggering accident was not “traumatic.”

Much of the law and policy applied by the WCB in this area is in direct conflict with medical/scientific standards.

Section 5.1 also expressly excludes from coverage any psychological injury resulting from the actions of an employer. For example, if the unjust termination or discipline of an employee

causes eventual suicide, the surviving family will have no claim for dependents' benefits under the **Act**.

There are currently a number of challenges to this legislation both at the Human Rights Tribunal and the BC Court of Appeal.

We recommend the removal of Section 5.1 of the **Act** and the inclusion of a provision that specifically recognizes cumulative psychological injury as compensable. As a model, we recommend the Ontario definition of "cumulative" stress.

RECOMMENDATIONS FOR PSYCHOLOGICAL INJURIES

- Repeal Section 5.1 of the **Workers Compensation Act**.
- Amend the **Workers Compensation Act** to clearly recognize that "cumulative mental stress" and "psychological disability," gradual onset or otherwise, are recognized work injuries.

CHRONIC PAIN

Chronic pain is not addressed in the current **Act**. However, the WCB has restricted workers' pension entitlement for permanent chronic pain conditions to a maximum of 2.5 percent (as a percent of total disability) by passing a policy to this effect.

The term "chronic pain" includes a range of medical conditions such as fibromyalgia, myofascial pain syndrome and psychological pain disorders. It is generally accepted that permanent chronic pain conditions develop in about 15 percent of injuries and that there is great variation in the nature and severity of these pain conditions. Also, individuals have a different tolerance for pain and so there will be a variation in their resulting disabilities.

In his report, Winter developed a view of pain which is reflected in and underlies the WCB chronic pain policy. Winter cited a number of reasons why chronic pain is difficult to compensate. In his view, chronic pain is difficult to assess, creates no objective impairment and so is not easily measurable. Winter also stated

that pain was not a barrier to a return to work and that workers with chronic pain should never be given a loss of earnings pension on that basis alone. In our experience, this view of pain pervades the WCB, whose policies reflect the attitude that pain is not, and cannot be, a real disability. It is “just pain.” It’s not that a worker cannot work; it just hurts to work.

Winter also stated that there was “a growing concern regarding the long-term financial implications of compensating for chronic pain.” It is our view that this approach to pain and pain disability is rooted more in concern for “long-term financial implications” than in medicine or law.

There is no real barrier to pain assessments. Although chronic pain disability assessments are complex, the civil courts often make these difficult assessments in personal injury cases, such as arise from motor vehicle accidents, and have quantified chronic pain disability like any other injury.

Also, other workers’ compensation boards have developed methods to assess this difficult condition. In Ontario, the compensation board has developed special guidelines for chronic pain with an impairment scale running from 0 – 80 percent.

Courts have also stepped in when other compensation systems have excluded or limited compensation for chronic pain disability. Nova Scotia amended its compensation legislation and regulations to exclude workers with chronic pain from all compensation, except for four weeks of treatment. In 2003, the Supreme Court of Canada ruled that these exclusionary provisions were contrary to Section 15(1) of the *Charter of Rights and Freedoms (Nova Scotia (Workers’ Compensation Board) v. Martin and Laseur, 2003 SCC 54)*.

The effect of the WCB policy to limit chronic pain compensation to 2.5 percent cannot be overstated. Workers with this condition are deemed to be able to return to work even if they are totally disabled by their pain condition. Rather than supporting the individual in a return to work, the WCB’s view of pain, embedded in policy, denies or belittles their disability. Those with chronic pain claims are also regularly subjected to video surveillance and have their credibility questioned.

Similarly, the WCB will regularly dismiss measured physical impairments on the basis that the physical tests are rendered “unreliable” because the tests are affected by “pain limitations.”

We recommend that chronic pain be recognized as a medical condition causing genuine disability, and that appropriate pension assessment protocols be implemented.

RECOMMENDATIONS FOR CHRONIC PAIN DISABILITIES

- Amend the ***Workers Compensation Act*** to provide that chronic pain is to be assessed and compensated like other disabilities.
- Require the WCB to establish specific guidelines for compensation for permanent functional impairment for chronic pain conditions, ranging from 0 – 100 percent.

SECTION II: PENSIONS – COMPENSATING PERMANENT INJURY

THE DUAL SYSTEM

(a) Compensation Principles prior to June 30, 2002

Prior to 2002, permanently injured workers were assessed for pensions by two methods: PFI and LOE. For well over 30 years, the former provisions of the ***Act*** have been interpreted as requiring both assessments. The worker was awarded a pension based on the higher of the two. This approach, set out in WCB policy, was known as the “Dual System.”

The Dual System was seen as fair because each pension method assessed the worker’s loss due to injury in a different way. It was thought that the worker should be given the benefit of the assessment which best compensated his or her loss.

The PFI pension is awarded on the basis of percent impairment of a whole person. The worker’s physical or psychological

impairment is assessed by a medical professional who assigns a percent impairment rating, using the Permanent Disability Evaluation Schedule (“PDES”) and/or other factors, as set out in policy. For some injuries, the assessment is quite straightforward. For example, the PDES schedule awards a 2.5 percent pension for an amputated little finger. The PFI pension is paid regardless whether the worker is able to continue working, on the basis that such permanent disabilities nonetheless have a lifetime effect on earning capacity.

However, if the worker cannot return to work or can only work part-time or at a lesser paying job due to the injury, the worker experiences a real, immediate and continuing economic loss due to the injury. An LOE assessment measures the worker’s actual loss of earnings due to an injury up to a maximum insured amount. If the worker’s actual economic loss is greater than the PFI percent, an LOE pension is seen as a fairer and more accurate compensation of the worker’s actual loss due to disability.

Example of the Dual System

Take the example of a worker earning \$70,000 a year who suffers a serious injury and permanent disability. The worker’s PFI might be assessed at 20 percent PFI. Based on the WCB’s earlier maximum wage rate of \$60,000, his actual pension payments would be \$9,000 a year (tax free). If this worker’s injury meant that he could only return to work part-time at an entry level job, his new earning level might only be \$10,000 per year. This represents an economic loss of \$60,000 per year due to his disability, of which only \$9,000 is compensated by a PFI pension.

Under the previous Dual System, the worker would automatically receive a partial LOE pension, calculated as the difference between what the worker earned prior to the injury up to WCB maximum (\$60,000) and what he could earn after the injury (\$10,000). His economic loss of \$50,000 would be compensated at a rate of 75 percent of gross to equate to \$37,500 (tax free).

Assuming that the part-time income of \$10,000 results in a take-home of \$7,500, a PFI pension would leave the worker with an annual net income of \$16,500, whereas a partial LOE pension would leave the worker with a net income of \$45,000.

As may be seen from this example, the impact of an LOE pension is dramatic on the life of a disabled worker after an injury.

(b) Positions on the Dual System: Royal Commissions and the Winter Report

Every Royal Commission reviewing the BC compensation system has considered the pension system. Historically, the WCB has always argued in favour of a single PFI pension system on the basis of its relative simplicity and administrative convenience. Employers have also supported the PFI system as the less expensive pension.

However, neither Justice Sloan in 1942 or 1952 nor Justice Tysoe in 1966 considered that the PFI system alone was adequate and both recommended the Dual System, although these recommendations were not acted upon until 1973. The Dual System resulted in about 83 percent of permanently injured workers being awarded PFI pensions and about 17 percent being awarded LOE pensions.

Winter recommended that the Dual System be retained, but that Section 23(3) be interpreted to allow an LOE pension award only when it was “equitable” to do so. At the same time, he recommended that the system for assessing PFI pensions be brought up to date, to accord with current medical practices. This would make a fair PFI pension the “default” pension, while leaving LOE pensions to be awarded when it was “fair” to do so.

To achieve these results, Winter recommended that the **Act** not be amended, and he specifically cautioned against the removal of the word “equitable” from Section 23 of the **Act** on the basis that it would unnecessarily limit the WCB’s discretion to respond fairly to individual cases.

Shortly after the Winter Report was released, the **Act** was amended to remove the “equitable” reference and to specify that LOE pensions were to be awarded only when the difference between the two types of pensions was “so exceptional.” The legislation then left the definition of “so exceptional” to the WCB Board of Directors.

The PFI system has still not been reviewed.

LOSS OF EARNINGS PENSIONS

(a) The Elimination of LOE Pensions: A Sleight of Policy Hand

The new Sections 23(3) and (3.1) provide that LOE pensions should be awarded:

...only if the WCB determines that the **combined effect** of the worker's occupation at the time of the injury and the worker's disability resulting from the injury is **so exceptional** that an amount determined under subsection (1) does not appropriately compensate...

Sixteen days after **Bill 49** became effective on June 30, 2002, the Board of Directors issued its new LOE policy (policy #40.00). This policy is complex and technical and at first, it was difficult to understand its implications.

This LOE policy established a series of tests, requiring WCB officers to compare a list of skills in the National Occupation Classification (NOC) to the worker's medical condition to determine if the worker could "remain" in the occupation. The tests specifically excluded any other factors affecting a worker's employability (age, education, other disabilities, language, etc.) and, until spring 2008, any pre-existing physical disability. Only if a worker passed the LOE policy "skill assessment" tests did the worker proceed to have his actual loss of earnings assessed to determine whether this loss was "so exceptional."

The LOE policy immediately became the primary barrier to an LOE pension. The LOE policy tests meant that most permanently injured workers never qualified for an LOE assessment, and so never learned whether their economic loss was "so exceptional." In the 16 month period **between February 2006 and June 2007, the WCB considered 1,992 workers' claims for a loss of earnings pension. Of these, 1,916 or 96 percent did not meet the LOE policy criteria.** However, of the 76 claims that did meet the criteria, 68 were granted LOE pensions (for comparison, prior

to 2002 approximately 1,000 LOE pensions were awarded annually).

The Board of Directors has embraced and defended this LOE policy as carrying out the intent of the legislation. In their view, the legislature intended to restrict not only LOE pensions, but also the LOE assessments to “exceptional circumstances.” And because a worker’s actual loss of earnings from an injury is first considered at the LOE assessment stage since 2002, most workers never have the economic consequences of their disabilities ever considered for compensation.

In our view, there is a close connection between the amended wording in Section 23(3) and (3.1) of the **Act** and the LOE policy. While the “so exceptional” wording did not appear so restrictive at the time, in retrospect the Section 23 amendments appear to have been undertaken, against Winter’s recommendation, for the purpose of restricting the WCB’s discretion to award LOE pensions. The new wording in the **Act** provides a basis for the restrictive LOE policy which is the primary barrier to LOE pensions. There have been many challenges to the LOE policy. In July 2006, a WCAT Vice-Chair referred the LOE policy to the WCAT Chair for her consideration of the conclusion that the policy was patently unreasonable. The WCAT Chair invited submissions from stakeholder groups, including the B.C. Federation of Labour and in December, 2007, issued a decision that the LOE policy was so patently unreasonable that it was not capable of being supported by the **Act** (WCAT 2007-03809). In this decision, the WCAT Chair found that the effect of the LOE policy was to essentially exclude unskilled labourers from any consideration for loss of earnings award, because “physical ability” was never identified as a “skill” under the policy.

On April 15, 2008, the Board of Directors issued its decision disagreeing with the WCAT Chair. The Board of Directors concluded that the narrow issue of how to capture a “physical requirement” is contained in the policy and any problem only consisted of how the policy was interpreted. In the result, the Board of Directors disagreed with the independent appeal tribunal’s conclusions and confirmed the policy as originally written (by the same Board of Directors).

(b) Impact of Reduced LOE Pensions on the Accident Fund

Due to the LOE policy, there was an immediate and dramatic reduction in the number of LOE pensions after June 30, 2002. Between 2000 and 2003, there was an average of about **970 LOE pensions** per year under the former **Act**. After the LOE policy was implemented it took some time before workers with permanent injuries were assessed under the new **Act**. By 2006, most permanent injuries fell under the new **Act** and in that year, the WCB awarded **39 LOE pensions**, out of about 1,500 referred for consideration. In 2007, **60 LOE pensions** were awarded. **The effect of the amendments and the new LOE policy was to reduce LOE pensions by well over 90 percent.**

The cost reduction for the WCB was immediate. **Between 2002 and 2006, the WCB reduced its total costs on pensions by over 50 percent.** This means that the LOE policy alone generated a huge savings for the Accident Fund at the expense of seriously injured workers who, had they been injured prior to June 2002, would have received an LOE pension.

Finally, the WCB is experiencing historic surpluses at the same time as it is posting some of the lowest assessment rates for employers in Canada. Much of the saving lies in the declining liability for future pension costs, as fewer and smaller pensions are awarded. Promoting the myth of unsustainability has now been replaced by the rather embarrassing burden of explaining the more than sustainable Accident Fund at a time when worker benefits are eroded. We do not see the WCB's drive to reduce employer costs as being "balanced" with anything. It has become an end in itself.

(c) Impact of Reduced LOE Pensions for Workers

(i) Economic loss of LOE pensions

The LOE pension is one of the most important benefits for a severely injured worker. For the injured worker who can never return to the same work or perhaps, can never work again, a PFI pension is small comfort. Without an LOE pension and without the ability to work, an injured worker faces a lifetime of financial hardship.

(ii) Forcing disabled workers to return to work

There is no doubt that as a result of the LOE policy, many seriously injured workers will have no income other than a small PFI and will have to try and work. This can result in re-injury or aggravation of their injury. In our experience, this is an increasing occurrence as injured workers are forced back to work.

(iii) No consideration for the “thin skull” rule – violation of dignity and human rights in “deeming” a disabled worker as able to work

In many cases there are other factors, besides the compensable injury, which significantly affect the employability of a permanently injured worker, such as personal characteristics (age, education, skills, experience, language), and geographic, economic and social conditions. Many of these factors make an injured worker more vulnerable to unemployment or under-employment. The LOE policy effectively excludes consideration of these factors as its technical tests mean that most workers never get the benefit of an employability assessment.

The law’s “thin skull” rule holds that the system should take the injured worker as is, and that a worker with a “thin skull” may end up with a greater disability than another worker with the same injury. This rule, applied to workers’ compensation, means that when a worker is rendered unemployable due to the combination of a work injury and pre-existing personal factors, the entire loss should be compensated.

In the Core Report, Winter accepted the “thin skull” rule as a valid compensation principle which was ensured by the “equitable” language of Section 23. However, the 2002 amendments removed this “equitable” language and the tests in the LOE policy exclude consideration of non-compensable factors from the determination whether a worker is able to return to work. In the end, workers actually unable to return to work are “deemed” able to do so.

Example: ESL Truck Driver

In 2005, a self-represented worker challenged the LOE policy at the Human Rights Tribunal on the ground that it discriminated against him (*Vasquez v. Workers Compensation Board of B.C.* [2006] BCHRT 190). Mr. Vasquez was working as a truck driver when he was involved in a serious motor vehicle accident, suffering both extensive physical injuries and Post Traumatic Stress Disorder. He was awarded a 19.22 percent PFI, but he was denied an LOE on the basis that he could work as a dispatcher. Under the LOE policy he was deemed able to do this work because his medical condition did not preclude him from the essential skills of a dispatcher.

The problem is that Mr. Vasquez was from El Salvador, his first language was Spanish and he was not employable as a dispatcher due to the language barrier. He was deemed capable of such work by the WCB and denied any LOE pension.

The case has not been heard as a human rights matter because the WCB appealed a preliminary ruling by the Tribunal to the BC Supreme Court and it has not proceeded.

(iv) Procedural barriers to LOE pensions & employability assessments

The LOE policy sets out a series of pre-conditions that the worker must meet before having an employability assessment. Therefore, it is not uncommon for a worker to win an appeal, be referred back to the WCB for the next LOE policy test, only to be denied again, requiring another appeal.

One example is the case of the worker in Case Study #2 (*Appendix A*). This worker was completely disabled from his work as a lumber grader at the age of 58. It has taken him eight appeals and more than six years to win a right to an LOE assessment at WCAT.

This drawn out procedure with its “revolving door” of appeals poses a significant barrier to full compensation for permanently injured workers.

PFI PENSIONS

Although the attack on LOE pensions has been the most dramatic, it is important to note the WCB's reduction of PFI pensions, a gradual process that commenced before the 2002 amendments.

(a) PFI Pensions Under-Rated

The current basis for PFI assessment, the PDES, is out of step with current medical science, based almost entirely on range of motion measurement, a method considered inaccurate or invalid by many experts. The WCB has nonetheless not updated its methods of measuring functional impairment for many years.

Winter recommended, as have others, that the WCB review the PDES schedule to ensure that it reflected current medical knowledge and an estimated impairment of earning capacity, not just medical impairment. We endorse this recommendation.

(b) PFI Pensions: Should be Payable for Life

The 2002 amendments also repealed former provisions that required that PFI pensions be payable for life and substituted Section 23.1, providing payment only to age 65. As noted, the basis for PFI pensions is permanent functional impairment, a permanent impairment for life. The longstanding rationale for payment for life was that such permanent impairments of long-term earning capacity also significantly impaired the ability of disabled workers to provide for retirement. The amendments provided for a retirement benefit equal to five percent of pension payments. In our view, the change reflected yet another provision for cost reduction, and substituted inadequate compensation for the consequences of permanent disability.

RECOMMENDATIONS FOR WCB PENSIONS

- Amend the *Workers Compensation Act* to repeal Section 23(3) and 23(3.1).

- Amend the **Workers Compensation Act** to reinstate the Dual System.
- Require the WCB of Directors to repeal its LOE policy and revise its pension policies accordingly.
- Amend the **Workers Compensation Act** to provide that PFI pensions continue for the life of the worker.
- Require the Board of Directors to review and revise its policies, schedules and guidelines concerning the assessment of PFI pensions.

VOCATIONAL REHABILITATION

A fundamental role of a compensation system is to assist those with work injuries to return to the workplace and to regain their ability to earn a living. The **Workers Compensation Act** has always left it to the discretion of WCB vocational rehabilitation consultants to determine how much assistance is necessary to get someone back to work.

A principal motivation for the WCB to provide effective vocational rehabilitation assistance was the knowledge that if workers suffered permanently disabling injury which prevented them from being able to earn their pre-injury wages, the WCB would have to compensate them with pensions which would make up the difference.

The 2002 changes to the WCB pension system have led to the virtual elimination of the WCB's vocational rehabilitation resources and programs. As noted in the previous section, if workers were not precluded from a skill by a medical condition, they were deemed to have retained the "skill" and were deemed able to return to that occupation. In this process, there was no assessment of:

- the worker's actual abilities;
- the real job's actual requirements;

- the worker's actual disability, including any need for accommodation;
- other life factors; and
- if a real job is available and suitable, given the above.

Instead, the worker is "deemed" able to return to work and the WCB records a successful "return to work" statistic.

These policy changes, not surprisingly, were accompanied by a dramatic reduction in the WCB's expenditure on vocational rehabilitation services. Between **2002 and 2005, its vocational rehabilitation budget was reduced by 98.8 percent (from \$130 million in 2002 to \$3 million in 2006).**

The policy changes, together with this dramatic reduction in expenditure, means that the WCB gives little actual assistance to workers trying to return to work. Typically, the WCB will assist in an accommodation if the worker is returning to the pre-injury employer. In a few cases (three to four percent) vocational rehabilitation services are offered to workers seeking other work, often in the form of a job search allowance. In its Annual Report, the WCB has targeted vocational rehabilitation services to produce a successful return-to-work rate (in 2006, it was 77 percent). It is our experience that many vocational rehabilitation programs are not genuine or effective training programs, but tend to generate successful completions and temporary placements, sufficient to get a "good news" story.

There are WCB vocational rehabilitation consultants who have expressed their frustration (even to the workers on their own caseload) at the gutting of the vocational rehabilitation department and the greatly restricted role they are now required to play. For example, when approved for retraining, workers used to be routinely offered up to 52 weeks of training. Now the maximum training that a vocational rehabilitation consultant can approve has been arbitrarily reduced to 26 weeks. Any longer periods are extremely rare and must be approved by vocational rehabilitation services management. There are very few training programmes that can be completed in 26 weeks, rendering much of what can be approved worthless.

This is an area where we see a great deal of human suffering and personal tragedy. Most injured workers just want to get back to work, to support their families and lead normal lives. In this step of the process where they first encounter the barriers to returning to work, they desperately need WCB support and can experience overwhelming frustration and grief.

The right to meaningful vocational rehabilitation assistance needs to be entrenched in the **Workers Compensation Act** in order to ensure that services are available to support and assist those whose lives have been disrupted by work injuries.

RECOMMENDATION FOR VOCATIONAL REHABILITATION

- Amend the **Workers Compensation Act** to expressly guarantee workers the right to meaningful vocational rehabilitation assistance

SECTION III: WCB DECISION-MAKING

IMPACT OF BINDING POLICY

In the preceding section, we outlined the fundamental shift from “full” compensation to “fair” compensation (or to “reasonable” compensation, from the employers’ perspective of what employers should be required to bear), marking a real shift in focus from compensation to cost-cutting.

There was a second type of change initiated by employers’ positions and reflected in the Winter Report, a call for changes to the WCB’s decision-making structure to address “problems” of inconsistency, uncertainty and delay.” Winter identified one source of these “problems” as the WCB’s discretionary decision-making and recommended that this be addressed by restructuring the process and establishing firm Board of Directors’ control over decision-making.

Until 2002, the **Workers Compensation Act** provided a broad discretion and direction to decision-makers and appeal bodies to make decisions based on the “merits and justice” of the case.

This scope of administrative discretion was consistent with many years of judicial consideration of the proper role of administrative policy. The general principle, judicially entrenched, was that while administrative agencies were entitled to create their own policies, those policies could not blind decision-makers to the circumstances of any particular case.

In 1989, the BC Court of Appeal endorsed this principle specifically for the WCB and stated that:

“a decision-maker must be prepared to entertain and consider representations that are designed to show not only that, properly interpreted, a rule or policy does not cover the facts of a particular matter, but also that even if it does, an exception should be made in light of the facts of the particular case.”

In a striking departure from such a time-honoured and reasonable approach, Winter recommended and the government enacted provisions that would remove this discretion both from decision-makers and from the two levels of appeal, rendering the WCB's policies legally binding.

In effect, these amendments delegated the right to make binding law to the politically appointed Board of Directors. WCB policy developed at the direction of the Board of Directors, and subject to the approval of the Board of Directors is elevated to the status of subordinate legislation, yet not subject to the control of any elected official.

At the same time, other provisions in the 2002 amendments insulate these binding policies from external challenge or appeal. Under the Section 251 provision, any challenge to the legality of policy is referred to the Board of Directors rather than to an appeal body or a court. A Section 251 referral involves a series of procedural steps to be strictly followed by any participant wishing to challenge a policy provision. The steps include first convincing a WCAT Vice-Chair that the policy is patently unreasonable and unsupported by the statute, and if successful, then convincing the Chair of the WCAT of the same. If able to pass those hurdles, the policy is then referred by the Chair to the very Board of Directors that earlier wrote the challenged policy. In two of three cases of policy that have been referred to the Board of Directors under this

process, the Board of Directors declined to alter the policy that had been found by two independent WCAT panels to be unlawful. In one of those cases, the policy was later held to be unlawful by the courts – in the other, a court challenge has not been taken. In both cases, the full process took years. Clearly, the design of the 2002 amendments is to place challenges to the lawfulness of WCB policies beyond the reach of most workers.

It is not possible to understand the changes in the compensation system after 2002 without understanding the WCB's use and control of binding policy. The 2002 amendments were only the starting point for the dramatic erosion of benefits and entitlement for injured workers. After 2002, the WCB began to pass policy at a rate which has overwhelmed workers and workers' advocates. The policy-making process continues at an extraordinary rate to this day, adding monthly to two large volumes of policy.

In this fashion, changes that began with the 2002 legislative amendments continue and expand as the WCB exercises its expanded authority and creates binding policy to further limit worker benefits. Some of the dramatic losses in compensation to workers result from WCB policies limiting benefits from loss of earnings pensions, chronic pain conditions, vocational rehabilitation assistance and retroactive interest.

Binding policy not only provides a mechanism for the WCB to continue eroding workers' benefits, it also changed the nature of WCB decision-making and the role of WCB officers. Prior to 2002, WCB officers were discretionary decision-makers who were required to investigate and evaluate the merits of a worker's case. While policy was an important guideline, the focus was on the worker and the worker's evidence. After 2002, WCB officers were required to apply binding policy and the policy became more and more specific and decision-making became, by necessity, an exercise in applying fixed rules.

As a result of this move to rule-based decision-making, WCB officers had to increasingly focus on policy and increasingly, injured workers reported never having personal contact with a WCB officer and receiving long written decisions which set out WCB policy. It is our impression that WCB officers are closely scrutinized in their application of binding policy and increasingly, policy rules give WCB officers little or no discretion in the outcome

of an entitlement decision. All of this has resulted in tight WCB control over WCB officers and compensation decision-making and a removal of the worker as the focus of compensation decisions.

Discretionary decision-making responsive to the circumstances and needs of individual workers was sacrificed on the employer-constructed altar of “certainty” and “consistency”, although the need for such change was never satisfactorily demonstrated. Thus, power over the results of workers’ claims was further concentrated in the politically appointed Board of Directors, effectively freed from supervisory constraints. As long as the overarching goal of cutting cost remains paramount, policy can and will be used to limit benefits, outside the arena of the political accountability of elected officials.

RECOMMENDATION FOR WCB DECISION-MAKING STRUCTURE:

- Amend the *Workers Compensation Act* by repealing the provisions that rendered the WCB’s policies binding on decision-makers, thereby reinstating the “merits and justice of the case” as overriding considerations.

RECONSIDERATIONS AND REOPENINGS

Another 2002 amendment was the “75-day” rule. This rule means that for 75 days after a decision, the WCB can reconsider and change that decision. However, after 75 days, the WCB cannot by law change the decision and, if it is not appealed, the decision cannot be challenged or changed for any reason for the life of the claim. It is effectively “set in cement.”

Prior to 2002, the WCB had a broad discretion to “reopen, rehear and re-determine any matter...dealt with by it or by an officer of the WCB.” This provision allowed the WCB to revisit its previous decisions in a number of ways, even years after the initial decision, and this broad remedial jurisdiction had existed for at least 67 years before 2002.

This broad jurisdiction for the WCB to remedy its own errors was recognition of the serious consequences of errors on the health,

jobs and futures of injured workers. Over the years, the WCB in practice and policy restricted exercise of this remedial discretion to significant and serious (not trivial) errors. In a system where the consequences of injuries can last a lifetime, a flexible vehicle for correction of error is essential.

As mentioned earlier, however, employers were looking for cost savings. Their appeal to goals of “certainty,” “consistency” and “finality” was really an appeal to reduce the use of various forms of remedial jurisdiction that increased both benefits and the administrative costs of the system. Making WCB policies strictly binding was a part of this confinement of decision-making discretion.

The 75-day rule has brought dramatic change to WCB decision making. For example, it has brought finality to all WCB decisions, even those that were made in error. After 2002, WCB decision-makers no longer had to deal with assertions that a prior decision was a result of a serious error. A wrong decision is just as binding on future claims decisions as a correct decision.

Some would answer that errors should be corrected through the appeal process. The fact is, however, that in the life of a typical worker’s compensation claim the nature of a previous error, the significance of the error, and/or the factual or medical basis of the error often do not become apparent until much later, and often later than the 90 days within which an appeal could have been taken. And in addition to the 75-day rule, the 2002 amendments restricted the ability of a worker to obtain an extension of time to appeal a decision after 90 days have passed. In effect, if a decision is not reconsidered within 75 days or appealed within 90 days, it is likely that a worker will never be able to change or challenge this decision.

Also, given the binding nature of “decisions,” there developed a need to define what is a “decision” (which cannot be reconsidered and is binding after 75 days). The WCB has now implemented policy distinguishing a “decision” from a “finding of fact” (which is not subject to the 75-day rule and cannot be appealed), adding yet another level of complexity to the process.

The 75-day rule is an unworkable provision. Certainty and finality are simply not features of long-lasting disabilities, and should not

justify the removal of remedial options. As the 1999 Royal Commission stated: “in workers’ compensation claims, flexibility is more important than finality.”

An example of the effect of the 75-day rule as a procedural barrier to workers’ claims lies in the timing of wage rate decisions on a claim. As discussed previously, the WCB makes wage rate decisions at the start of a claim and may revise the wage rate after two months have passed (ten-week review). In cases of permanent disability, the ultimate pension wage rate is the rate established at those earlier times. A worker in receipt of wage loss benefits at an early stage may not appreciate this and may not appeal a wage rate decision because expecting or hoping for a quick recovery. Much later, when permanent disability becomes apparent and it becomes clear that the earlier wage rate determines benefits for the balance of a worker’s working lifetime, it is too late to appeal and the WCB is precluded from reconsidering, even if grossly in error. Any appeal to “finality” should not bear this kind of result, unless “finality” is a euphemism for “cost cutting.”

Flexibility is also more important than finality in the area of the WCB’s jurisdiction to “reopen” a claim. In this sense, reopening means the provision of additional benefits on a claim based upon a later change in a worker’s condition or circumstances. Again, prior to 2002, the WCB’s jurisdiction was broad and remedial. In the 2002 amendments, the WCB’s jurisdiction to reopen a claim was confined to cases of “significant change in a worker’s medical condition” or “recurrence of a worker’s injury.” Related policy development has also been restrictive.

Other than saving money, there is little reason to support the provisions that restrict and limit remedial jurisdiction in workers’ compensation claims and much to support flexibility. Claimants often struggle with the effects of workplace injuries that have at least temporarily, or permanently, diminished their ability to continue in chosen careers. They are most often unrepresented in their dealings with the WCB, and often do not fully appreciate the consequences of decisions made on their claim, let alone fully understand the appeal processes.

The restrictions on corrective mechanisms such as reconsideration and re-openings simply allow the door to be closed on the worker who seeks correction of error.

RECOMMENDATION FOR RECONSIDERATIONS AND REOPENINGS

- The ***Workers Compensation Act*** should be amended to restore the WCB's jurisdiction to "reopen, rehear and re-determine any matter" which the WCB has previously decided or processed.

APPEAL PROCESSES

Prior to the 2002 amendments, there were three significant appeal options: a WCB decision could be appealed to the Workers' Compensation Review Board and then to the Appeal Division. If there was a medical issue, it could be appealed to a Medical Review Panel (made up of independent medical specialists whose decisions were binding on the WCB).

The 2002 amendments dispensed with all three of those avenues and replaced them with two new ones: WCB decisions can now be appealed to the Review Division, a department of the WCB; and then to the Workers' Compensation Appeal Tribunal (WCAT), an agency external to the WCB. While the WCAT was given authority to engage independent health professionals to provide opinions on medical matters, nothing else was provided to replace the medical role of the previous Medical Review Panels.

Our experience, however, is that these appeal processes quickly became unfriendly and inaccessible to ordinary workers. As previously discussed, the requirements of binding policy, the 75-day rule, and other changes created a technical and complicated analytical framework for decision-making in general. These provisions also resulted in appeal procedures and decisions that simply cannot be understood by workers. Workers that we represent are now very rarely able to figure out from an appeal decision whether they have won or lost an appeal, let alone understand the details of the analysis.

The jurisdiction of the appeal bodies is now commonly limited in several ways. An appeal may be limited, even made moot, by the effect of earlier binding decisions. An appeal may also be limited by the wording of the decision under appeal itself, which must be carefully scrutinized as to what was decided and what may have been left undecided. If an issue was not specifically addressed in the decision, the appeal body may find that it cannot address that matter when it has not first been decided by the WCB. The appeal will then proceed without consideration of that issue on the worker's appeal; no matter how closely related the issues are.

Workers are increasingly frustrated by engagement in an appeal process that they think will resolve disputes and being told that the appeal body cannot address an issue or that the result is dictated by some earlier decision. This and the fragmentation of issues at the WCB and on appeal leave many workers feeling they have become trapped in a revolving door of multiple appeals.

A worker aggrieved by the binding application of a WCB policy that may depart from the legal requirements of the **Act** is faced with a policy-challenge procedure that is lengthy, complex, and convoluted.

Inaccessibility of the appeal process has been compounded by the view of both appeal bodies that they have a very limited jurisdiction to extend appeal deadlines. Because an un-appealed decision cannot be corrected after 75 days and may be a substantial obstacle to future benefits, the appeal deadlines are no longer informal. Yet, based on Winter's comments and the 2002 amendments, both the Review Division and the WCAT now take the position that they must impose a more onerous threshold.

All of this is compounded by increasing delays in secondary adjudications and proper implementations of successful appeal decisions.

In addition, the WCAT makes referrals to independent health professionals only infrequently. At the same time, the WCB and the appeal bodies increasingly rely on the opinions of WCB-employed medical advisors who place brief opinions, often prejudicial to the worker, on the claim file. An appeal is then likely to succeed only with new medical evidence. The abolition of

Medical Review Panels has left workers without recourse to independent medical expertise and so must obtain any new medical and other expert opinions at their own initial expense. Expert medical opinions can cost thousands of dollars, yet workers' compensation appeals are often advanced by injured workers challenging decisions that have denied even modest benefits.

We take no objection to the 2002 revision of the appeal structures. Internal review followed by external appeal (with ready access to oral hearings) can be an effective process. However, appellate processes must be readily accessible and easily understood by workers, on evidence-based decision-making, and operate under a broad remedial jurisdiction to provide ready and comprehensive correction of errors.

What has been created is a labyrinth littered with jurisdictional pitfalls and minefields, and we endorse the comments of a former Chief Appeal Commissioner of the Appeal Division in 1993 in cautioning against exactly such a result:

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

We have described in the preceding sections some of the ways that compensation coverage, benefits and services have been reduced over the last six years. The clear message that came with the 2002 amendments was that the costs of the system had to be reduced, a message that was well advanced publicly by employers and by the government.

The message seems to have been received: the overriding goal of cost reduction was certainly reflected in the revisions of the published policies of the WCB that followed in short order. The Board of Directors was also firm in its explicit reiteration of that goal. In fact, after both a Vice-Chair and the Chair of the WCAT in separate decisions found that one of the WCB's policies was “so patently unreasonable that it is not capable of being supported by the **Workers’ Compensation Act**,” the Board of Directors simply reaffirmed the policy, stating that it had been “made

manifestly clear that an important and overriding goal of the **Amendment Act** is that of ensuring the future fiscal sustainability of the workers' compensation system through a change in the way in which future benefits are to be calculated and paid."

There were voluminous revisions to the policies of the WCB following the 2002 amendments that appear to have been driven by the Board of Directors' acceptance of the "important and overriding goal" of cost reduction. The changes to the policies governing adjudication of entitlement to Loss of Earning pensions is but one example, a policy revision that reduced the number of such pensions awarded in 2005 by more than 93 percent from 2000 figures.

The new 75-day rule requires a search for technical obstacles to a particular outcome. Implementations of appeal decisions can take a long time. Such delays will often result in further fragmentation of issues and further multiple appeals.

Delays in the adjudicative process work to the disadvantage of workers and to the further financial benefit of employers. For many years, the policy of the WCB was to pay interest on retroactive payments to workers, where more than a year had passed from the date of entitlement. In October, 2001, the WCB by policy severely restricted the entitlement to interest, and there are now very few retroactive payments that attract interest, even in the event of very long delays.

We are of the view that all of these results are the consequences of an administration based upon the principle goal of cost reduction, a goal that can only be achieved (according to the administration) by the reduction or denial of benefits to injured workers. In a system that purports to operate on an inquiry model and where the **Act** requires that evenly balanced possibilities are supposed to be resolved in favour of workers, the system more and more seems to operate as if workers bear the burden of proof and that this burden is ever increasing.

Certainly, the goal of cost reduction is being achieved, but at the cost of the legitimate interests of injured workers who are finding it increasingly difficult to navigate an administrative labyrinth in the face of such institutional resistance.

Clearly the message from the highest levels must be shifted to a message focused on the fair assessment of injured workers' entitlements. We have recommended various changes throughout this report that would move in that direction. However, there are two other specific legislative changes that we would propose: statutory entrenchment of principles fundamental to the operation of the compensation scheme, and a requirement that workers be paid interest on any retroactive or delayed benefit payments.

The rationale for a statutory entrenchment of principles is obvious: a legislative statement of principle can guide the actions of the WCB. The rationale for statutory reinstatement of a requirement to pay interest on all retroactive benefit payments is equally obvious: the workers entitled to retroactive payments should be placed in a position as close as possible to the one in which they would have been but for the delay, the WCB and its officers should understand that there is no cost saving to delay, and employers should pay for the actual cost of delay.

RECOMMENDATIONS FOR WCB APPEAL AND ADMINISTRATIVE PROCESSES:

- Amend the ***Workers Compensation Act*** to allow appeals to the WCAT from all decisions of the Review Division.
- Amend the ***Workers Compensation Act*** to redefine the jurisdiction of the Review Division and the WCAT to be broadly remedial, with jurisdiction to decide all issues explicitly or implicitly underpinning a WCB decision, and with retention of jurisdiction over implementation of appeal decisions.
- Amend the ***Workers Compensation Act*** to provide for jurisdiction in the WCAT to determine whether any WCB policy underlying the decision under appeal accurately or adequately reflects the provisions of the ***Act***.
- Amend the ***Workers Compensation Act*** to provide for liberal extensions of time in which appeals may be commenced.

- Amend the ***Workers Compensation Act*** to reinstate the previous Medical Review Panel process.
- Amend the ***Workers Compensation Act*** to entrench the principles set out in the first chapter of this report.
- Amend the ***Workers' Compensation Act*** to require the WCB to pay interest at the WCB's own rate of return on investment on all retroactive benefit payments.

CONCLUSION

It was tempting during the course of preparing this Report to pragmatically focus on only a few of the most destructive changes made in recent years to the compensation system in BC and to focus on only a few recommendations for correction. However, it became clear to us as we attempted to articulate the experiences of injured workers and their advocates that the changes were designed and have acted to work together to produce a whole much greater than the sum of the parts. That whole has so seriously undermined the workers' compensation system in this Province that piecemeal correction cannot correct the systemic defects that have been produced.

We have described the current state of the system as a labyrinth littered with jurisdictional pitfalls and minefields, the result of a systematic attack on both benefits and the decision-making process. In our view, only a systematic approach can hope to remedy the result.

SUMMARY OF RECOMMENDATIONS

1. Amend the ***Workers Compensation Act*** to entrench the following principles:
 - Entitlement to compensation for workplace injuries is regardless of fault;
 - Security and speed of payment of compensation benefits without need for court process;

- The adjudication and administration of a compensation system are independent;
 - All costs of a compensation system are borne by employers;
 - Compensation and rehabilitation of injured workers, along with the prevention of workplace injury, are the foundations of a modern workers' compensation system;
 - Injured workers and their dependents are entitled to full compensation for loss of earnings and earning capacity caused or significantly contributed to by any work-caused injury, condition or disease;
 - Entitlement to and determination of benefits are close with full and fair assessment based on the worker's circumstances, consistent with the principles of the *Charter* and human rights legislation;
 - A worker is entitled to benefits where that worker's compensable disability has diminished his or her earnings or earning capacity, taking into account all of the consequences of those injuries and all of the worker's own circumstances. The worker's own evidence of those consequences and circumstances must be given due consideration.
 - Injured workers are entitled to be treated with dignity and respect throughout their dealing with the adjudicative and appellate processes of the compensation system, and such processes are readily accessible and easily understood by workers. Adjudicative and appellate processes will focus on evidence-based decision making, and the appeal process will provide ready and comprehensive correction of errors.
2. Amend the ***Workers Compensation Act*** to base all benefits on 100 percent of net earnings.

3. Amend the **Workers Compensation Act** to adjust benefits according to the CPI every six months.
4. Amend the **Workers Compensation Act** to provide for flexible establishment of wage rates that fairly reflect an injured workers earning capacity and actual economic loss.
5. Amend the **Workers Compensation Act** to ensure that the long-term wage rate on a claim can be reconsidered or appealed at the time of any permanent pension decision.
6. Repeal Section 5.1 (“mental stress”) of the **Workers Compensation Act**.
7. Amend the **Workers Compensation Act** to clearly recognize that “cumulative mental stress” and “psychological disability,” gradual onset or otherwise, are recognized work injuries.
8. Amend the **Workers Compensation Act** to provide that chronic pain is to be assessed and compensated like other disabilities.
9. Require the WCB to establish specific guidelines for compensation for permanent functional impairment for chronic pain conditions, ranging from 0 – 100 percent.
10. Amend the **Workers Compensation Act** to repeal Section 23(3) and 23(3.1).
11. Amend the **Workers Compensation Act** to reinstate the Dual System.
12. Require the WCB of Directors to repeal policy #40.00 and revise its pension policies accordingly.
13. Amend the **Workers Compensation Act** to provide that PFI pensions continue for the life of the worker.

14. Require the WCB of Directors to review and revise its policies, schedules and guidelines concerning the assessment of PFI pensions.
15. Amend the **Workers Compensation Act** to expressly guarantee workers the right to meaningful vocational rehabilitation assistance.
16. Amend the **Workers Compensation Act** by repealing the provisions that rendered the WCB's policies binding on decision-makers, thereby reinstating the "merits and justice of the case" as overriding considerations.
17. Amend the **Workers Compensation Act** to restore the WCB's jurisdiction to "reopen, rehear and re-determine any matter" that the WCB has previously decided or dealt with.
18. Amend the **Workers Compensation Act** to allow appeals to the WCAT from all decisions of the Review Division.
19. Amend the **Workers Compensation Act** to redefine the jurisdiction of the Review Division and the WCAT to be broadly remedial, with jurisdiction to decide all issues explicitly or implicitly underpinning a WCB decision, and with retention of jurisdiction over implementation of appeal decisions.
20. Amend the **Workers Compensation Act** to provide for jurisdiction in the WCAT to determine whether any WCB policy underlying the decision under appeal accurately or adequately reflects the provisions of the **Act**.
21. Amend the **Workers Compensation Act** to provide for liberal extensions of time in which appeals may be commenced.
22. Amend the **Workers Compensation Act** to reinstate the previous Medical Review Panel process.
23. Amend the **Workers Compensation Act** to entrench the principles set out in the first chapter of this Report.

24. Amend the **Workers Compensation Act** to require the WCB to pay interest at the WCB's own rate of return on investment on all retroactive benefit payments.

APPENDIX A

CASE

STUDIES

1 - 7

CASE STUDY # 1:

No Loss of Earnings Pension for a Disabled Worker; Multiple Appeals

The worker was a 47-year-old welder. For over 20 years, he was a specialized welder earning over Board maximum although he had no formal qualifications or training. Rather, he had immigrated to Canada with little English and a grade six education, and had worked into this position.

In 2004, this worker jumped from a work platform to avoid being hit by a falling object and shattered his left elbow. The worker underwent emergency surgery which failed to reconstruct the elbow and months later, he had a second surgery to repair the damage. He was left with post-traumatic arthritis and chronic pain in the elbow which made moving his arm extremely painful. His surgeon considered him “completely disabled from manual labour.”

The Board issued a pension decision with two parts:

- (a) He was awarded a 14.25 percent PFI pension which at his wage rate was about \$475 a month. The WCB also approved vocational rehabilitation benefits for him to retrain as a parts sales person. However, the training program did not seem genuine as the worker kept passing, even when he was not able to do the work and also, the activity aggravated his pain condition. After two months, the worker’s doctor wrote that he should discontinue attendance due to his worsening pain condition. The Board then terminated his rehabilitation benefits and he was left with only his PFI pension.
- (b) At the same time, the Board also found that the worker was not entitled to an assessment for an LOE pension because the worker could continue in similar occupations” of NOC 2261 (Nondestructive Testers and Inspectors) and NOC 7214 (Contractors and Supervisors, Metal Forming, Shaping and Erecting Trades).

On appeal, the Review Division found that these occupations were NOT similar to that of a welder and returned the decision to the Board.

In its second policy #40.00 decision, the Board **AGAIN** denied that the worker was entitled to an LOE assessment under the second test of policy #40.00. The Board concluded that the same position of "Welding Supervisor" (NOC 7214) was a "suitable" occupation and because in the Board's view, the required skills were "primarily supervisory," the worker would be able to perform the skills of this occupation. This decision was made despite the clear evidence that the welding supervisor position is a "hands on" position (even in the NOC description) which requires the worker to demonstrate skills and set up machines, activities which he can no longer do. This decision was also appealed.

However, with only a PFI pension, the worker and his family experienced increasing financial distress. He decided to see if additional surgery would repair his left elbow so he could try to return to work. The Board approved additional surgery in the US. Unfortunately, this third surgery not only failed, but severed some additional nerves. The worker's claim is now re-opened and he is waiting for a new pension decision.

Prior to the failed third surgery, this 47-year old skilled worker was awarded a 14.25 percent PFI pension or about \$475 a week, less than \$25,000 a year. Prior to his injury, he was earning over \$75,000 a year. He was twice denied an LOE assessment, under two different tests in policy #40.00. Without the support of his union through multiple appeals, he would have been left to seek employment as a disabled worker with chronic pain, little in the way of skills or education.

After the failed third surgery, he is left with an even greater disability, significant chronic pain and the prospect of further appeals on a new pension decision.

CASE STUDY # 2:

Multiple Appeals, Fragmented Issues and Failure to Implement Appeal Decisions: Worker Injures both Shoulders and Seeks LOE Pension

After working for years as a lumber grader, this 58-year old worker injured both of his shoulders at work. The Board accepted his claim and seven months later determined that he could return to his work as a grader. The Board also found that he was not entitled to a PFI pension or a referral to vocational rehabilitation.

The worker could not return to his pre-injury job because it involved the constant use of his shoulder muscles as he lifted, turned and graded lumber. The Review Division referred his claim back to the Board to reconsider its decisions. In a second decision, the Board concluded **AGAIN** that the worker was able to return to his former job as a grader. His appeal from this decision was also successful, and the Review Division directed the WCB to reassess his employability.

In a third decision, the Board accepted that the worker had permanent chronic pain conditions in both shoulders and awarded him a permanent pension of 2.5 percent PFI. However, they did not assess the actual disabling effects of the pain condition as this was not required under the chronic pain policy. The Board also decided that the worker was not entitled to a loss of earnings pension because, in their view, he was able to return to his former work as a lumber grader. This pension decision was confirmed at the Review Division.

On appeal, a WCAT panel found that the worker was entitled to a 2.5 percent chronic pain award for each shoulder and that his permanent condition had indeed disabled him permanently from returning to his former occupation and from returning to any similar occupation. The WCAT panel also ruled that he was entitled to have his LOE pension entitlement considered again by the WCB.

In implementing the WCAT decision, the Board issued a fourth decision, **AGAIN** denying him an LOE pension on the basis that a WCB doctor had reported *three years earlier* that the worker's

disability did not prevent him from returning to his former job as a grader! His representative wrote to the Board to point out that this decision was in direct conflict with the WCAT decision but due to the 75-day rule, the worker had to pursue yet another appeal to the Review Division to confirm his right to a new LOE assessment.

This worker has been unable to return to work since 2002, and yet has not received any earnings loss replacement since February 2003. He has a PFI of five percent. He turned 65 in October 2008, at which time his LOE pension entitlements ended, before he received any. It is only through extraordinary persistence that this worker's LOE pension is finally being awarded, in December 2008, well over six years from his original shoulder injuries, and after eight appeals.

CASE STUDY # 3:

Policy #40.00: Deeming into a "Similar Occupation"

A 62-year old x-ray technologist developed severe and permanent tendonitis in both wrists and could no longer do her job. The Board said that her tendonitis did not come from her work activities and denied her claim. Her claim was accepted on appeal to WCAT.

The Board then determined that this worker could return to her job despite her permanent tendonitis condition. She again appealed and after two years, a second WCAT panel found that she could not return to work as an x-ray technologist and that she should be assessed for a loss of earnings pension.

The Board followed policy #40.00 to implement this decision. Policy #40.00 requires the Board officer to follow the National Occupational Classifications (NOC) system for determining whether a worker can return to work at her own or "a similar" occupation for pension purposes. In the NOC category of Medical Technologists and Technicians, there are sub-categories, including #3211: medical laboratory technologists and #3215:

medical radiation technologists. The Board found that because these two positions shared a common general NOC code, they were “similar” occupations and if the worker could no longer do x-rays, she should then be able to be a medical laboratory technologist. In fact, these are two entirely different professions, requiring different education and skills, and belonging to a completely different professional body. The worker knew nothing more about medical laboratory technologists than would any other member of the public.

On the basis of this decision, Disability Awards found that the worker would not have any loss of earnings and thus had no entitlement to a loss of earnings assessment. After two more appeals over 18 months, a third WCAT panel found that a medical laboratory technologist was not an appropriate profession for her and ordered that she be assessed once more by Disability Awards.

The worker is now 65-years old and has retired and may be older before her pension decision is finally made.

CASE STUDY # 4:

“Thin Skull” Rule: Worker has Pre-existing Factors which, Together with the Injury, Render Him Competitively Unemployable. Policy #40.00 Deems Him as Able to Return to Work so no LOE Assessment or Pension.

A worker had a car accident in his youth, which left him with a brain injury. Due to his brain injury, this worker was slow to process information and was unable to organize tasks. He eventually found work with a small company as a painter, where the crew structured his work for him.

In 2005, this worker fell 28’ off a roof and suffered multiple injuries, including serious injuries to both legs and a shoulder. The Board found that the worker no longer had the physical ability to climb ladders or stairs, stand for long periods, reach and do many of the physical demands of the job.

In the pension decision, the worker received a PFI pension of about 22 percent or just under \$385 a month. He did not qualify for an LOE assessment. The Board officer applied policy #40.00 and concluded:

- The “essential skills” of a painter did not include the physical ability to paint as physical ability is not a “skill” under the policy.
- An “essential skill” of a painter is the ability to plan, organize jobs and materials and supervise others. This worker was deemed to have these skills because he was working as a painter. [In fact, he had not had these skills for many years due to his pre-existing brain injury.]
- The worker was deemed to have retained these skills, because these skills were not inconsistent with his physical work injury; and
- Because he is deemed to have retained the skills of a painter, he is not qualified to have an employability assessment to determine if his pre-injury earnings differed from his post-injury earnings.

In reality, this worker is competitively unemployable. With a combined disability (mental and physical), he has been unable to find work at all. On appeal, the Review Division referred this matter back to the Board to reassess his pension in light of the **Human Rights Code** and the decision is pending.

CASE STUDY # 5:

Denial of PTSD Claim because Trauma not “Unexpected”

An ambulance paramedic suffered the tragic loss of her son in a motor vehicle accident. The following year she attended at the site of an motor vehicle accident while on the job. She encountered a young man strongly resembling her son, who had

suffered injuries very similar to those which had caused her son's death. She had to spend a great deal of time trying to extricate him from the vehicle, and then trying to resuscitate him, but to no avail. She could not revive the young man. She released his body to the Medivac crew to be flown out of the crash site.

The worker suffered an immediate traumatic reaction to this event and experienced the onset of PTSD. She applied to the Board for compensation. There was clear medical evidence that her disabling psychological condition arose from this work event.

The Board denied her claim on the basis that as a paramedic, the worker should be immune to catastrophic psychological injuries because these events are not "unexpected" in her line of work. The Board also found that the particular event was not "traumatic" because it did not meet an "objective standard of what is traumatic i.e., would anyone, in these circumstances have suffered the same results.

Medical professionals generally agree that a PTSD is a reaction to events which are traumatic to a particular individual. Thus, the worker was vulnerable to this particular trauma in light of recent events, despite the fact that this type of trauma could be expected in her work.

This worker's claim was not successful because of the restrictive interpretation which Board policy gives to Section 5.1 of the **Act**, which is meant to exclude claims from "mental stress," i.e., psychological injury.

CASE STUDY # 6:

Low Back Pain and Chronic Pain: Under-Estimating a Disability

The worker was 46 years old when she hurt her back while working in a large mail room. She was changing a 127 pound roll of paper when it slipped and she caught it while in a bent position. The worker finished her shift although her lower back became

increasingly painful. The next day, she could not return to work and she now has not been able to work for over three years. The worker describes her ongoing pain level as ranging from 7/10 to 10/10. She has attended pain clinics and physiotherapy and received injections. She is currently under the care of a pain specialist and has an approved regime of narcotic medication, including constant morphine patches.

Despite this, the Board accepted her physical injury only as a temporary lumbar strain. The worker felt that this diagnosis was wrong and paid for a private MRI. On the basis of the results of the MRI, the worker was referred to a back specialist who found that her back pain was mechanical with possible disc involvement at the L5/S1 level and myofascial pain. There have been further investigations and the diagnosis is still elusive. The Board has continued to deny that she has any permanent back injury and this matter is under appeal to WCAT.

Early in the claim, the case manager made remarks which the worker understood to suggest that the pain was all in her head and she could get better "if she wanted to." The worker was very distressed as she felt that these remarks implied that she was not telling the truth or was lying about her condition. She developed a significant depression and this too, required an appeal before it was accepted by the Board.

The Board has now accepted a permanent injury of chronic pain and psychological injury for a total of 33.4 percent PFI of which 30 percent is for psychological impairment and 2.5 percent is for pain. Despite the severity of her pain condition, this worker has never had her chronic pain disability assessed due to the 2.5 percent PFI policy. She feels that the Board has never accepted that she has a real physical disability and this distresses her. After numerous appeals, the worker has been referred for an LOE assessment and also hopes someday to get the right kind of pain relief so she can return to work.

CASE STUDY # 7:

Delays in Implementation of Appeal Decisions/Chronic Pain

A 27-year-old worker fell down some stairs while at work. The Board accepted her initial injuries and paid temporary wage loss benefits for several months.

The worker tried to return to work but she developed chronic pain and other disabling symptoms and had to stop working about four months later due to her increased disability. She was unable to work again for almost four years. She then returned to work on a graduated basis, struggled with periods of disability and part-time work and eventually, was accommodated by the employer and was again able to work full-time, about six years after her initial injury. The Board did not pay any benefits during this period because it said that her ongoing disability was not a result of her fall.

On her first appeal, a WCAT panel found that the worker's chronic pain and other disabling symptoms were a result of her work fall and her claim was referred back to the Board to determine her benefits. This WCAT decision was not implemented for two years.

When it was implemented, the Board found that the worker was entitled to only one more month of temporary wage loss than she had originally received, on the basis that the worker **COULD** have worked during the six years when she was denied benefits. The worker appealed that decision to the Review Division which denied her appeal.

During this lengthy period of time, the worker developed a psychological condition (Pain Disorder and Major Depression), which the Board and the Review Division also denied. A second WCAT panel allowed these appeals, finding that her psychological conditions were consequences of her initial workplace injuries, and that she was indeed entitled to wage loss benefits for the six year period.

This second WCAT decision was not implemented for almost a year. The Board then issued a significant amount as retroactive temporary wage loss and her employer immediately tied this amount up in litigation about what is owed to their disability insurer, taxes, etc.

The Board also awarded the worker a 2.5 percent PFI pension for chronic pain, despite psychological evidence that she had a much greater disability (25-40 percent) from chronic pain. The worker has filed a complaint at the Human Rights Tribunal that her chronic pain compensation amounts to discrimination under the ***Human Rights Code of BC.***

APPENDIX B

STATISTICS AND ECONOMICS

REPORT ON CHANGES TO THE BC WCB SYSTEM (2002-2008)

This section will examine the statistical changes in areas of compensation benefits, injury rates and employer assessments during the period 2002 to 2008. The rationale for changes to the benefits paid to injured workers was largely to ensure the financial viability of the Workers' Compensation system. The Core Services Review of the WCB by Alan Winter released March 11, 2002 states the following in regards to financial viability.

"In reviewing the financial information provided to me by the WCB, I have been convinced that the current workers' compensation system in BC is becoming unsustainable. The WCB incurred a deficit (unaudited) in 2001 of \$286.8 million.

If the status quo of the current system is maintained the WCB projects further deficits in 2002 (of \$422 million), 2003 (of \$301 million), 2004 (of \$251 million) and 2005 (of \$181 million). These projections will result in the WCB assuming an unfunded liability in 2002 of approximately \$288 million, which will continue to grow to an overall unfunded liability of approximately 1 billion dollars by the end of 2005."

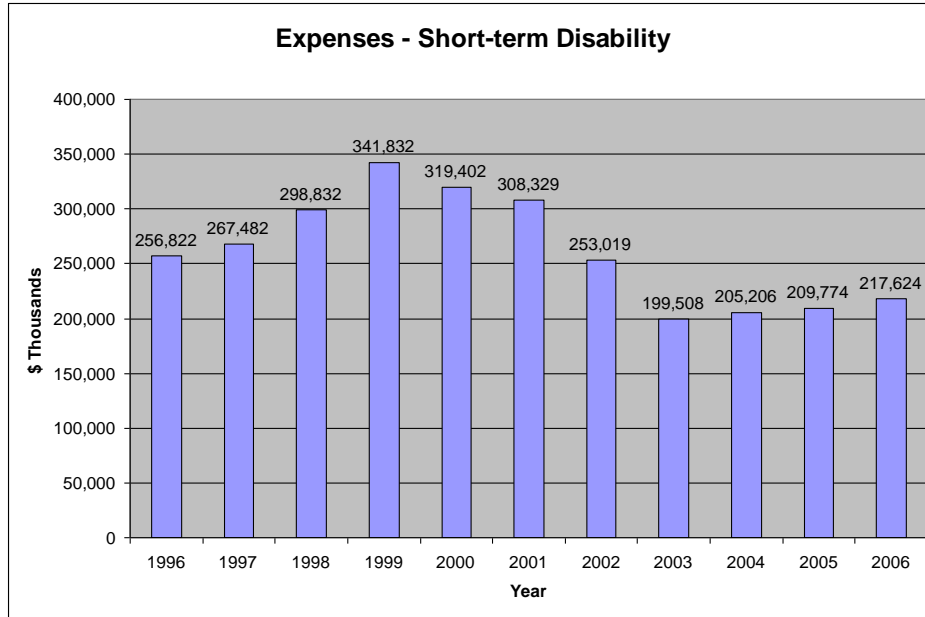
WCB Surplus Deficit \$ Million	Core Report Projections	Actual
2001	(286.8)	424
2002	(422)	(146)
2003	(301)	7.8
2004	(251)	347
2005	(181)	474

These projections have been demonstrated to be in error. In 2005, the Board had a surplus of \$474 million. The surplus grew to \$987 million in 2006. The underpinnings for the reductions in worker benefits are based on a gross error on the financial outlook of the workers' compensation system.

Short Term Disability Benefits

Short-term disability benefits have been affected by changing from 75 percent of gross to 90 percent of net benefits for workers whose injuries occurred after June 30, 2002. Net benefits calculate deductions that likely would have been made for income tax, Canada Pension Plan (CPP) and Employment Insurance (EI) contributions. Workers on short-term disability benefits do not have contributions made for them towards CPP and EI, and they do not get credited towards these benefits.

On average a worker on 90 percent net benefits receives 13 percent less wage loss benefits than a worker on 75 percent of gross. The average short-term claim duration in 2005 was 47.7 days. For the first six months of 2002, claims started would have been under the former provisions and for the last six months under current provisions. Some longer duration claims would have been paid under former provisions into late 2002. By 2003, the number of short-term claims still paid under former provisions would represent a small portion of the total claims. The amount of short-term disability benefits dropped from \$308,329,000 in 2001 to \$199,508,000 in 2003 for a reduction of \$108,821,000 paid to workers per year for temporary wage loss benefits. This represents a 35.3 percent reduction in short-term wage loss expenses for the Board. During this same period the number of short-term claims accepted went from 64,165 to 53,372, a reduction of 16.8 percent in the number of claims allowed. The reduction in short-term disability benefits paid exceeds the reduction in the number of short-term claims paid by 18.5 percent. This does not take in to account any wage rate increases in indexing. It is clear from the significantly greater drop in benefits paid over the number of claims allowed that the reduction in wage rates for short-term disability benefits has resulted in greatly reduced benefits per each worker and corresponding transfer of those costs from employers and the Board to workers.

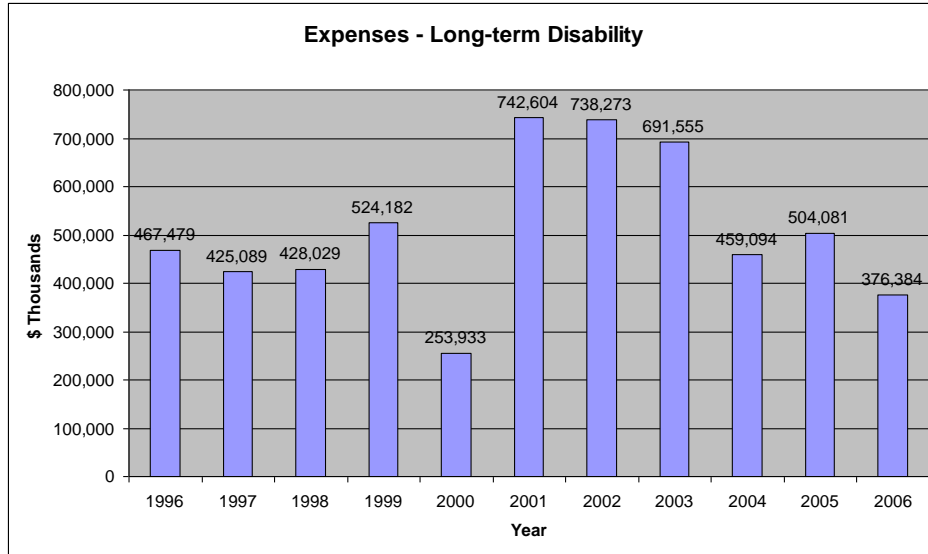


Source – WCB Annual Reports

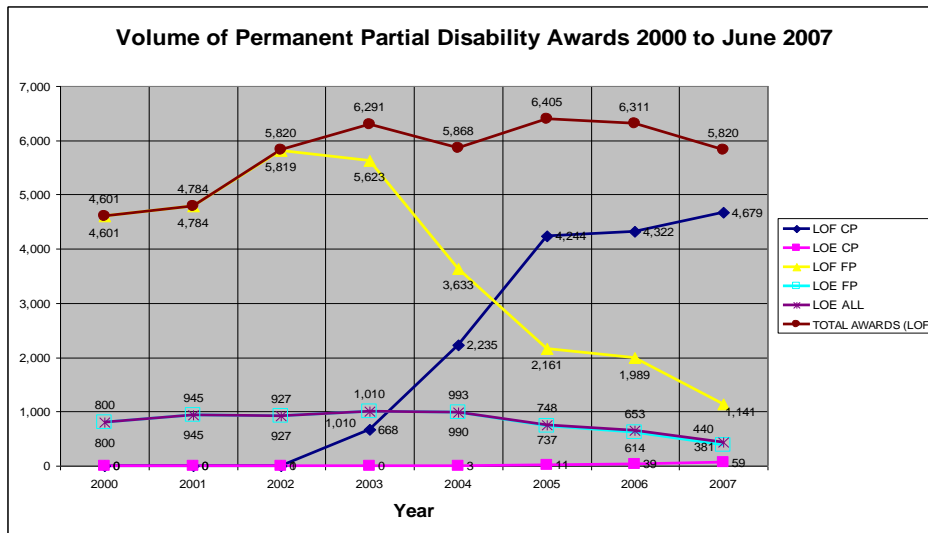
Long-Term Disability Benefits

Wage rates for all types of benefits are based on the wage rate set on the claim. The reduction to 90 percent of net impacts the amount paid on permanent disability pensions as it does Vocational Rehabilitation (VR) benefits and survivor benefits. The other major impacts to pension awards are the “so exceptional” clause that has almost eliminated loss of earnings pensions, paying pensions only to age 65 and deducting half of CPP disability pensions from WCB pension awards.

In a July 24, 2007 discussion paper on Loss of Earnings, statistics were provided on the volume of permanent partial disability awards under Current and Former Provisions on both Loss of Function and Loss of Earnings basis. Those statistics are presented graphically on the following chart.



Source – WCB Annual Reports



Source – LOE Discussion Paper – July 24, 2007

Taking the total numbers from 2000 to 2007, for every 4.2 claims awarded on a functional basis under the former provisions, one was awarded on a loss of earnings basis. Under the current provisions the ratio is for one LOE award for every 122 functional awards. Functional awards typically pay only a fraction of the amount a LOE award compensates. The number of workers that are experiencing LOEs has not gone down. The difference is simply that under the current provisions most workers that are, in

fact, experiencing an LOE, will not receive an LOE award. In the decision that resulted in the referral of policy item #40.00 to the Board of Directors by the WCAT Chair, the Board had considered a Loss of Earnings of 33 percent compared to a 10.65 percent functional award not to be “so exceptional” that the functional award did not appropriately compensate for the injury. This is an uncompensated 23 percent loss of earnings. There are now between 800 and 1,000 workers per year who would be similarly experiencing uncompensated loss of earnings each year as a result of the change to Section 23(3) and the applicable Board policy. This is a massive transfer of income from workers with more severe permanent disabilities to the WCB.

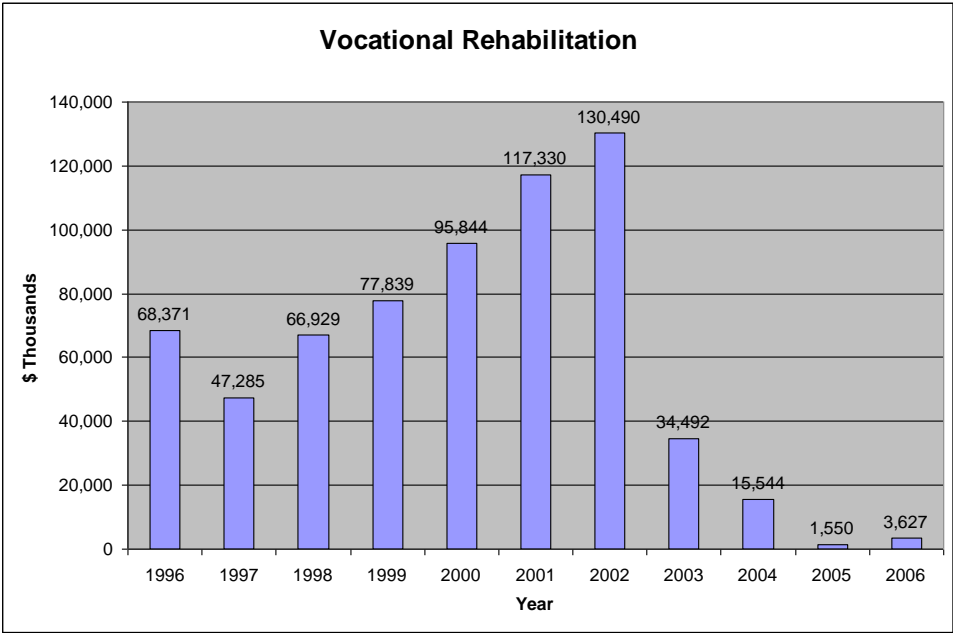
Workers who suffer permanent injuries close to the age of 65 receive much less compensation under the current provisions than under the former provisions. The following real-life example is provided to illustrate the difference.

A worker suffers an injury at 63 years of age. The effective date of the pension was two months before the worker turned 65. The functional award is assessed at 14.99 percent. At the worker’s wage rate, under current provisions, the monthly pension was \$493.33 and the total pension awarded was \$986.66 plus a retirement benefit of \$49.34 for a grand total of \$1,036.00. It was determined the pension should have been assessed under the former provisions. When this same pension was calculated under the former provisions the monthly benefit was \$568.68 as of the same effective date two months prior to age 65. The functional award is paid for life instead of until age 65. If the worker lives only to age 65 the worker will receive \$68,241.60 without taking indexing in to account. A 14.99 percent functional impairment is a very significant injury. All workers that are now assessed under the current provisions will receive minimal compensation for their permanent disability if they are near 65 years of age.

Vocational Rehabilitation

The effects of the changes to LOE policy have had their most dramatic and immediate effect on VR benefits. It is not hard to understand why this is the case. If a loss of earnings as a result of the injury is not going to be accepted on a claim, there is not much need to provide VR Services. VR benefits also do not experience the same delay that Long-Term Disability benefits do.

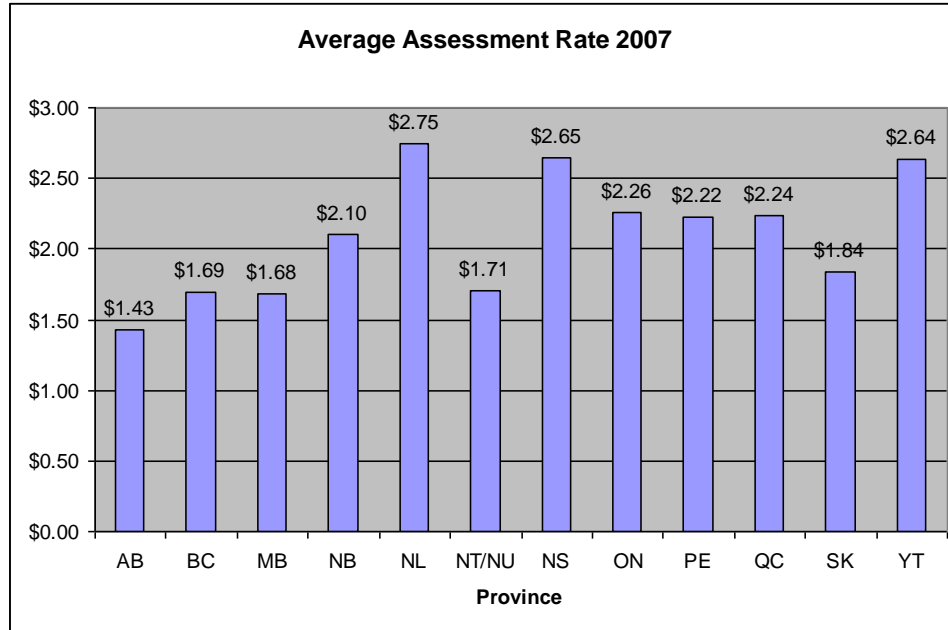
The effects of the changes are more quickly seen in VR and will reflect where Long-Term Disability benefits are heading. Between 2002 and 2005, the Boards expenditures for VR benefits went from \$130,490,000 to \$1,550,000. The 2005 VR expenditure is 1.2 percent of the 2002 expenditure, a staggering reduction of 98.8 percent. There was a bounce back in 2006 VR expenditures to \$3,627,000, but that still represents only 2.8 percent of the 2002 expenditure. What is apparent when looking at the figures is that workers who are unable to return to their pre-injury employment have suffered devastating hits to their income as a result of the changes to pension and VR benefits. It is these workers who have borne the biggest impacts.



Source – WCB Annual Reports

Assessment Rates

Assessment rates in BC have been on a steady decline. Comparing assessment rates to other Canadian jurisdictions from figures provided by the AWCBC for 2007, only Alberta and Manitoba have a lower assessment rate than BC. Manitoba’s rate is \$1.68 compared to BC’s \$1.69, so that is essentially even. The assessment rate in Ontario is \$2.26, 33 percent above the BC rate.



Source – AWCBC – March 2007

In his Core Report, Alan Winter argued to reduce workers' benefits to maintain competitiveness with other jurisdictions.

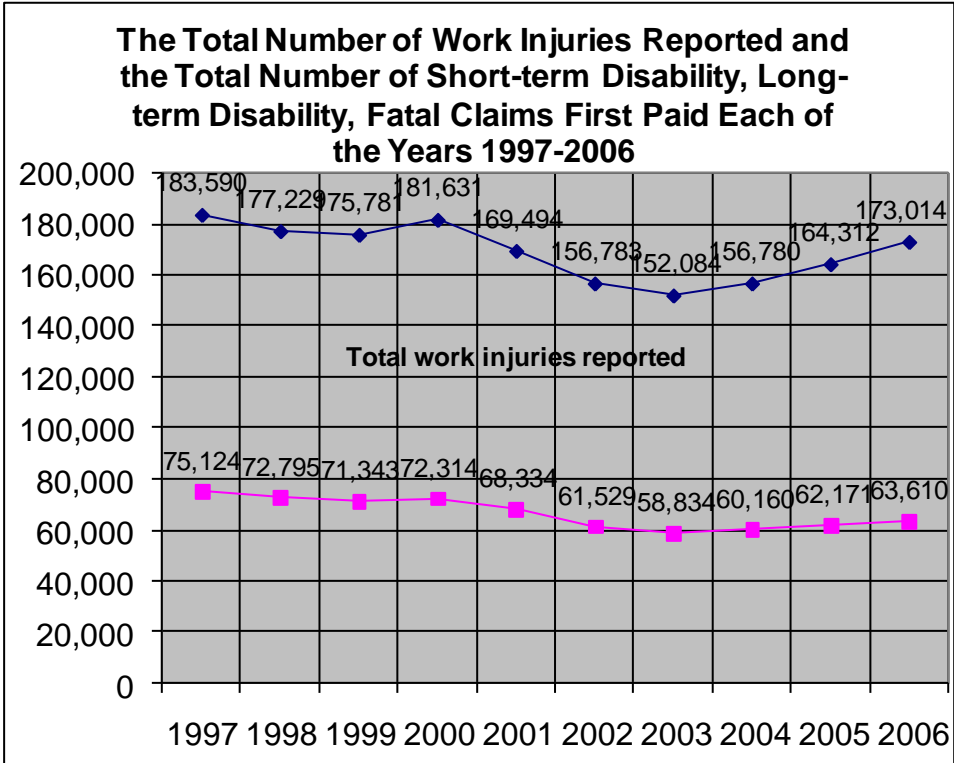
“The benefits provided by the BC workers’ compensation system and the resulting costs associated with the funding of these benefits, should not place employers in BC at a competitive economic disadvantage vis-à-vis employers in other jurisdictions.”

The assessment rates that has resulted from the legislated changes do not support an economic justification for the impoverishment of permanently disabled workers.

Injury Rates

Between 2000 and 2003, the total injuries reported and claims first paid declined. Those numbers have been rising since 2003. The economic incentives for employers to reduce injury declines as a result of the reduction to injured workers. For example, the worker in Care Study #6 is experiencing a 33 percent loss of earnings capacity, but is receiving only a functional award of 10.65 percent. The difference is uncompensated and a direct

loss to the worker. The compensation system and employer assessments do not account for that loss. This results in a financial disincentive to prevent such injuries or to mitigate the loss suffered by the worker. Each injury is less expensive simply by the reduction to 90 percent of net earnings. Permanent disabilities are less costly due to the near elimination of LOE awards, live time pensions, CPP offset and cutbacks in VR services. If employers are not paying the costs for those injuries, they would be unwise to invest in prevention. Unless the costs are reflected in the system, it is expected that injury rates will continue to rise.



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