

PETRIE RECOMMENDATIONS
ON VOCATIONAL REHABILITATION
AND COST RELIEF

Submission to the
Workers' Compensation Board
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Authority

This document is respectfully submitted on behalf of the Executive Officers of the BC Federation of Labour and represents the views of more than 500,000 affiliated members across the province of British Columbia.



W. Laird Cronk
President

1510-19sub lc wcb submission on petrie recommendations/km^{move}

Introduction

The BC Federation of Labour (“Federation,” “BCFED”) appreciates the opportunity to provide our submission with respect to the proposed recommendations on vocational rehabilitation and cost relief from the compensation policy review by Paul Petrie: Restoring the Balance: A Worker-Centered Approach to Workers’ Compensation Policy (CPR).

The Workers’ Compensation Board (WCB) Board of Directors (BOD) accepted all 41 of the Petrie recommendations and directed the Policy, Regulation and Research Division (PRRD) to implement the recommendations into policy. The PRRD has conducted a consultation process with stakeholders on the recommendations regarding vocational rehabilitation and cost relief.

Vocational rehabilitation

Petrie recognized that early return to safe, productive and durable work is a key principle of the workers’ compensation system. Petrie quotes the 1966 Royal Commission Report by Justice Tysoe, in which he stated:

*The prime mission of those who administer workmen’s compensation and the prime purpose of the Act is not to furnish financial benefits, but to promote and encourage measures for the prevention of injury to workmen in the course of their work and, should any be so unfortunate as to become disabled as a result of such injury, means for their rehabilitation and return to useful employment as soon as possible.*¹

Petrie acknowledged in his review that *restoring an injured worker to suitable employment with the injury employer at the level of his or her pre-injury earnings is at the heart of a worker-centred approach and is the primary focus of this review.*

The WCB considers vocational rehabilitation programs and return to work as their #2 and #3 Key Performance Indicators in their 2018 Service Plan:

¹ Commission of Inquiry Workmen’s Compensation Act. 1966: pp 18-19

Key performance indicator 2: Improve return-to-work outcomes:

This indicator measures the success of initiatives designed to engage injured workers and their employers in returning to work. Meeting or exceeding this return-to-work target is the intended result.²

Key performance indicator 3: Improve return-to-work outcomes for workers in vocational rehabilitation:

Injured workers referred for vocational rehabilitation are often dealing with potentially life-altering injuries. We engage with workers, employers, and service providers to help achieve successful return-to-work outcomes. Meeting or exceeding this target is the intended result.³

According to the WCB's 2018 Service Plan, 2,460 workers in the vocational rehabilitation program returned to employment, a success rate of 85%. Of these workers approximately 48% obtained work with new employers or became self-employed. These encouraging statistics suggest the vocational rehabilitation program is working well, but on a closer look, these percentages are based only on those workers who complete the 26-week rehabilitation program. Despite the urging of the BCFED and the BC Building Trades, other unions and advocates, the WCB does not track workers after they leave the program. There is no tracking of the long-term success when workers return to employment. Given this gap in information the WCB has no way of knowing whether the current system is achieving meaningful, durable outcomes.

Unfortunately, the importance of effective vocational rehabilitation and return to work supports for injured workers is not recognized in legislation.

² <https://www.worksafebc.com/en/resources/about-us/annual-report-statistics/2018-annual-report/2018-annual-report-2019-2021-service-plan?lang=en>

³ <https://www.worksafebc.com/en/resources/about-us/annual-report-statistics/2018-annual-report/2018-annual-report-2019-2021-service-plan?lang=en>

British Columbia is the only province in Canada where there is no legislative requirement in the *Workers' Compensation Act* (WCA) obligating employers to rehire injured workers. The closest we have is WCA Section 16:

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

Petrie, in his report, believes this gives the WCB *wide latitude to enact policy to restore injured workers to suitable employment that is safe, productive and durable to minimize any financial loss that the worker will incur as a result of a compensable disablement.*

But rather than taking this “fair, large and liberal construction” interpretation of Section 16, the changes implemented by the Liberal government in 2002 resulted in the WCB designing policies which constrained the vocational rehabilitation programs rather than ensuring workers were assisted to return to meaningful and durable work. Policies that do not consider the worker’s abilities, the requirements of the job, ensuring pre-injury job was made safe and if there was a suitable job available. Rather workers are “deemed” able to return to work.

The BCFED 2009 report “Insult to Injury” best describes the effects of the new policies as a “virtual elimination” of the WCB’s vocational rehabilitation program.⁴ Accompanying the policy changes was a drastic cut to the vocational rehabilitation budget which was reduced from \$130M in 2002 to \$3M in 2006, a 98.8 % drop.⁵ In 2018, the WCB spent \$1.7M on vocational rehabilitation programs. After adjusting for inflation, over 50% below the 2006 spending levels.⁶ Accompanying the cost-cutting measures was a reduction of job retraining from 52 weeks to the current 26 weeks. Any extensions are rare and must be approved by management. There are very few training programs that can be completed in 26 weeks, certainly not programs that

⁴ : Guenther, S., Patterson, J., O’Leary, S. (2009) *Changes to the BC Workers’ Compensation System 2002-2008. The Impact on Injured Workers - Adding Insult to Injury*. This is available at <http://bcfed.ca/news/briefs/insult-injury>

⁵ Same as footnote #4

⁶ WorkSafeBC 2018 Annual report and 2019-2021 Service Plan

can ensure an injured worker of long-term, economically sustaining work. And as stated already in our submission, the success of these outcomes is not tracked by the WCB.

Although the BCFED regards the implementation of Petrie's recommendations for policy changes as important and necessary we maintain that these changes are constrained by the language of the WCA. We have recommended legislative changes to the Patterson compensation review to include a legal obligation on employers to rehire injured workers. We have also recommended that the WCB be given the authority to impose penalties on employers who do not comply with this requirement.

7.1 Vocational rehabilitation recommendations resulting in proposed policy changes

As outlined in the Discussion Paper, the WCB has identified four recommendations that will require adding statements of principle to policy: #5, #6, #9 and #11.

In recommendation #5, Petrie sets out principles that will ensure quality rehabilitation:

- safe and early return to work with the same employer;
- the value of return to work in maintaining a worker's productivity and dignity;
- timely intervention by the WCB to provide accommodation supports and services;
- maximizing the worker's earning capacity after injury; and
- recognizing the employer's duty to accommodate workers.

With the exception of the duty to accommodate, the BCFED supports the recommendations providing additional statements of principle.

Any discussion of return to work must include consideration of the duty to accommodate. In the Rehabilitation Services and Claims Manual, Vol 2, Chapter 11, Section 87.00 states:

where the worker cannot return to the same job, the employer will be encouraged to accommodate job modification or alternate in-service placement.

The WCB's authority is limited to "encouraging" a pre-injury employer to accommodate an injured worker.

Currently, in BC, the duty to accommodate falls under the *Human Rights Code* (the Code). The WCB has no legislation that it can rely upon to require employer compliance with the Code. The recent Supreme Court of Canada decision in the *Quebec vs Caron*, sets an important precedent in affirming that human rights legislation, with specific reference to the duty to accommodate, supersedes any legislative requirements regarding a worker's ability to return to work after injury. It simply is not enough for employers to comply with their respective workers' compensation legislation. They must first and foremost satisfy the duty to accommodate.⁷

The BCFED believes the employer's duty to accommodate is far too complex to be relegated to a statement of principle in the policy.

There is a concern that if the WCB starts enforcing human rights obligations and the duty to accommodate, that may preclude workers from pursuing human rights complaints in other venues. The BCFED has asked the Patterson Compensation Review Panel to closely review this matter, consider the effectiveness of such legislation in other jurisdictions and provide a workable solution that would allow the Board to take effective action against employers who impede vocational rehabilitation efforts by refusing to accommodate the worker while also ensuring that workers can pursue other human rights remedies where appropriate.

7.2 Vocational rehabilitation recommendations resulting in no proposed policy changes

7.2.1 Two Vocational Rehabilitation recommendations: Current Policy likely more Worker-Centric

a) Vocational Rehabilitation Assistance without Delay

⁷ <https://www.scc-csc.ca/case-dossier/info/sum-som-eng.aspx?cas=36605>

The PRRD has determined that Petrie’s Recommendation #7, regarding vocational rehabilitation assistance without delay in conjunction with medical treatment and physical rehabilitation, where there is evidence of barriers to return to work with the injury employer may set a higher standard for workers to seek services than the current policy. Current policy does not require evidence of barriers to return to work.

But Petrie may have been concerned, as the BCFED is, with the often-aggressive push to return injured workers to work before they have recovered from their injuries. This submission is not a discussion about the concept of “early return to work” but we believe this must be approached cautiously so as to ensure that workers are not forced to return to work prematurely, which often ends up exacerbating their injury or causing a re-injury.

The BCFED agrees with the BC Building Trades recommendation that language be developed to remind the WCB to ensure that a vocational rehabilitation program for a worker *proceed in a thoughtfully paced fashion informed by the limitations and restrictions on the worker’s claim and with an eye to the contemporaneous medical condition*. A truly worker-centred approach.

b) Vocational Available When Worker Medically Able to Participate

The BCFED disagrees with the PRRD proposing to not implement the Petrie recommendation #10. The language in the Petrie recommendation is superior because vocational rehabilitation assistance “will” be available to the worker whereas current policy states that vocational rehabilitation “should” be provided to the worker. Therefore, the BCFED recommends that the WCB adopt Petrie recommendation #10 in its entirety.

7.2.2 Three vocational Rehabilitation Recommendations Already Reflected in Current Policy

a) Sufficient Vocational Rehabilitation Services to Compete

The BCFED disagrees with the PRRD that Petrie's recommendation #8 is already reflected in Policy C11-88:00. The Policy states that a plan is developed in collaboration with the worker, the employer and health care providers.

Petrie's recommendation introduces a new principle that *sufficient vocational rehabilitation supports will be provided to ensure that workers can successfully compete when they return to employment*. The principle will place a higher onus on the WCB to ensure that all supports are made available to ensure a successful return to employment for the injured worker.

We have already addressed the issue of the reduction in WCB expenditures on vocational rehabilitation programs since 2002 along with the cutbacks in re-training time frames.

Therefore, the BCFED recommends that Petrie's recommendation #8 be implemented into the policy.

b) Vocational Rehabilitation Plan Reasonably Achieves the Goal

Petrie's recommendation #12 proposed to amend the policy to include a commitment that the rehabilitation plan have a reasonable probability of achieving and sustaining the vocational goal over the long-term. The PRRD has determined that the current policy reflects the same intent: that the rehabilitation plan consider if the worker has a reasonable probability of successfully achieving the vocational goal.

The BCFED disagrees with the PRRD because Petrie is stating emphatically that a commitment be made in the policy to "leave no stone unturned" and there is a fulsome application of the "merits and justice" in each vocational rehabilitation plan.

Therefore, the BCFED recommends that Petrie's recommendation #12 be adopted into policy in its entirety.

c) Vocational Rehabilitation Plan Modified when Circumstances Change

The BCFED agrees with the PRRD that the Petrie recommendations appear to exclude workers who are unable to return to the injury employer.

7.3 Cost relief recommendations: Accommodation and investigation costs

7.3.1 Relieving Vocational Rehabilitation Costs of Accommodation

Petrie's recommendation #16 proposes amending policy to provide cost relief for the employer of the rehabilitation costs associated with the accommodations under policy #115.30 so long as the employment is durable and long term.

The BCFED has concerns regarding the Petrie recommendations and the current policy:

1. Petrie's recommendation states that employers should be relieved of costs if the accommodation is considered successful 12 months after its inception.

What criteria are used to determine success and how will this be measured?

Petrie provides no explanation for using 12-months? Is there research to back this up?

2. The current policy states that the vocational rehabilitation process includes ongoing consultation with employers to maintain all opportunities for suitable re-employment. The WCB may provide worksite and job modifications assistance to facilitate re-employment in physically appropriate working conditions, including expenditures of special equipment and/or tools.

With the growing numbers of mental disorders claims and the requirement to develop suitable accommodations for these types of claims, it is curious that the current policy considers only "physically appropriate working conditions." There must be consideration of the psychological health of a workplace.

7.3.2 Relieving Wage-Loss and Vocational Rehabilitation Costs of Investigations

Petrie's recommendation #19 considers situations where workers dispute offers of selective/light employment made by their employer, leading to an investigation of the suitability of the offer. This is more commonly referred to as light or modified duties. The recommendation proposes where a successful accommodation is achieved after an investigation, the costs and wage-loss payments during the investigation are not charged to the employer.

The BCFED agrees with the BC Building Trade's submission that this recommendation should not be implemented. We have heard from many injured workers of their experiences with the highly ineffectual light duty processes in which the WCB favours the employer and treats injured workers like a commodity to be used at the whim of the employer.

The BCFED supports the PRRD's decision to continue working on developing alternative ways to incentivize employers.

Conclusion

The BCFED is pleased to have been given the opportunity to provide our input and recommendations on the Petrie recommendations for Vocational Rehabilitation and Cost Relief. We urge the WCB Board of Directors to seriously consider our recommendations.