INSULT TO INJURY

CHANGES TO THE BC WORKERS’ COMPENSATION SYSTEM (2002 - 2008):
THE IMPACT ON INJURED WORKERS

A REPORT TO THE
B.C. FEDERATION OF LABOUR

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Stan Guenther
Janet Patterson
Sarah O’Leary
FOREWORD

This report 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 the assistance of Jim Sayre and Jim Parker and the support of their respective firms and employers (including Health Sciences Association, Rush Crane Guenther, B.C. Nurses Union and Community Legal Assistance Society), and with assistance and commentary from many other advocates.

The report will be available on the B.C. Federation’s web-site at www.bcfed.ca.

The changes that are the subject of this paper followed amendments to the **Workers’ Compensation Act** [the “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 and on the Workers’ Compensation Board of B.C. (“WCB”).

Since the changes have been extremely negative, we have often been asked whether it is time for labour to depart from the “historical 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 B.C. 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 principals of a modern compensation system and provide key recommendations for restoring a balanced and socially valuable system.
Also, while we state that the WCB’s decision-making has become anti-worker, we do not suggest that this view describes all WCB officers. We understand that at the highest levels, the goal of cost reduction has resulted in legislation and WCB policy that has been used to confine or eliminate the discretion of individual WCB decision-makers. To the extent that adjudicative choice still exists, we believe that the cost-cutting message consistently communicated by the government and WCB administrators since 2002 has actively encouraged officers to deny or limit worker claims, effectively creating a “culture of denial.” We appreciate that even in this punitive atmosphere, some officers are still trying to adjudicate fairly and humanely.

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.
EXECUTIVE SUMMARY

Since 2002, substantial changes have been made to the laws and policies that govern the workers’ compensation system in British Columbia. Those changes were driven by an employer lobby advancing the view that the system had become economically unsustainable. While the premise amounted to myth, the changes were real and profound and based upon no discernable principle other than that of reducing employers’ costs. In that regard, they were very successful, but at a significant cost to workers’ benefits and treatment under that system.

The authors endorse a set of principles upon which a modern workers’ compensation system should operate, as a context in which to assess these developments, their effects on injured workers, and to consider corrective actions. These principles are set out in our recommendations.

The combination of legislative amendments, ongoing policy revision, and structural changes has resulted in:

- reduction of benefit rates from 75% of gross income to 90% of net income, resulting in a net reduction of benefits by 13%;

- reduction of Consumer Price Index (“CPI”) indexing of pensions to the rate of CPI increases less 1% and to a cap of 4% in any year, and calculated only once per 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, with special prejudice to new, casual and seasonal workers;

- wage rate determinations early in a claim, leaving errors uncorrectable when applied later to pensions;

- restrictions on compensation for psychological injuries (no coverage for gradual onset conditions, requirement of “unexpected” cause, exclusion of conditions resulting from actions of employers);
restrictions on compensation for permanent chronic pain and similar conditions (to 2.5% for functional pensions, non-acceptance as barrier to employment);

virtual elimination of pensions based on actual long-term losses of earnings as a result of various policy and procedural barriers to having the worker’s loss of earnings assessed;

inadequate functional pensions (no longer payable for life; no review of Permanent Functional Impairment (PFI) Assessment schedules);

virtual elimination of vocational rehabilitation assistance;

delegation of power to Board of Directors to enact binding policy, resulting in removal of discretion in decision-making processes (decisions determined by policy rules, rather than on the “merits and justice” of the case) and concentration of power in Board of Directors;

restriction of WCB’s “remedial jurisdiction” which results in WCB decisions being “set in cement” with no ability to respond, review and readjudicate prior decisions and with restricted ability to re-open claims;

unfriendly and inaccessible appeal processes that have become technical, complicated and difficult to understand, with limited jurisdiction; and

a worsening “culture of denial” throughout the adjudicative and appellate processes.

The authors identify the shift of focus from the circumstances of workers to cost reduction for employers, and the removal of discretionary decision-making through the delegation of binding policy powers as fundamental to these changes, and identify the most extreme consequences as the effective elimination of loss of earnings pensions and the virtual elimination of vocational rehabilitation services. The authors further endorse recommendations designed to return to a principled and effective compensation system responsive to the needs of injured workers.
SUMMARY OF RECOMMENDATIONS

1. Amend the **Workers’ Compensation Act** to entrench the following principles:

   - Entitlement to compensation for workplace injuries should be regardless of fault;
   - There should be security and speed of payment of compensation benefits without need for court process;
   - The adjudication and administration of a compensation system should be independent;
   - All costs of a compensation system should be borne by industry;
   - 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 should be 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 should be with full and fair assessment based on the worker’s circumstances, consistent with the principles of the *Charter* and human rights legislation;
   - A worker should be 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 weight; and
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 should be readily accessible and easily understood by workers. Adjudicative and appellate processes should focus on evidence-based decision making, and the appeal process should provide ready and comprehensive correction of errors.

2. Amend the **Workers’ Compensation Act** to base all benefits on 100% of a worker’s net earnings.

3. Amend the **Workers’ Compensation Act** to adjust benefits according to the Consumer Price Index every 6 months.

4. 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.

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 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 Board to establish specific guidelines for compensation for permanent functional impairment for chronic pain conditions, ranging from 0 – 100%.

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 of assessing pensions so all permanently injured workers are assessed for both impairment and loss of earnings.

12. Require the Board 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 Board 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 Board’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 redetermine any matter” that the Board 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 Workers’ Compensation Appeal Tribunal (WCAT) to be broadly remedial, with jurisdiction to decide all issues explicitly or implicitly underpinning a Board 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 Board 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 Board’s own rate of return on investment on all retroactive benefit payments.
KEY STATISTICS: WCB ECONOMICS AFTER 2002

Re VIRTUAL ELIMINATION OF LOSS OF EARNINGS PENSIONS

The following statistics show the dramatic change in the number of loss of earnings pensions awarded.

- Prior to 2002, the WCB awarded an average of 970 loss of earnings (LOE) pensions per year between 2000-2003. As the new Act and policy took effect, the WCB considered a similar number of permanently injured workers (about 1,500 per year) and awarded the following loss of earnings pensions:

  2006 - 39 LOE pensions
  2007 - 60 LOE pensions

- Under the former Act, the usual ratio was one loss of earnings pension for every 4.2 functional awards (2000-2007). Under the new Act/policy, the ratio is one loss of earnings pension for every 122 functional awards.

- The effect of the new Act and policy was to reduce loss of earnings pensions by well over 90%.

Re VIRTUAL ELIMINATION OF REAL VOCATIONAL REHABILITATION

- Between 2002 and 2005, the Board’s expenditures for Vocational Rehabilitation (VR) benefits went from $130,490,000 to $1,550,000.

- The 2005 VR expenditure is 1.2% of the 2002 expenditure, a staggering reduction of 98.8%.

- In 2006, VR expenditures increased to $3,627,000, but that still represents only 2.8% of the 2002 expenditures.
Re EMPLOYER’S ASSESSMENT RATES DECLINE

Assessment rates in BC have been on a steady decline. Comparing assessment rates to other Canadian jurisdictions from figures provided by the Association of Workers’ Compensation Boards of Canada (AWCBC) for 2007, only Alberta and Manitoba have a lower assessment rate than BC. Manitoba’s rate is $1.68 compared to B.C.’s $1.69 so that is essentially even. The assessment rate in Ontario is $2.26, 33% above the BC rate.

Re SURPLUS FOR THE WORKERS’ COMPENSATION BOARD

In 2002, the reductions in worker benefits were based on the belief that the WCB was “unsustainable” due to rising claim costs. This is a myth because any deficit is made up by increasing employer assessments to keep the system sustainable.

Now, despite declining employer assessments, the WCB has a growing surplus. In 2005, the Board had a surplus of $474 million. The surplus grew to $987 million in 2006.

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<tr>
<th>WCB Surplus Deficit $ Million</th>
<th>Core Report Projections</th>
<th>Actual</th>
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<tbody>
<tr>
<td>2001</td>
<td>(286.8)</td>
<td>424</td>
</tr>
<tr>
<td>2002</td>
<td>(422)</td>
<td>(146)</td>
</tr>
<tr>
<td>2003</td>
<td>(301)</td>
<td>7.8</td>
</tr>
<tr>
<td>2004</td>
<td>(251)</td>
<td>347</td>
</tr>
<tr>
<td>2005</td>
<td>(181)</td>
<td>474</td>
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SIGNIFICANCE OF THE LOSS OF EARNINGS PENSION TO INJURED WORKERS

Under both the former and new Act, functional awards (“PFI pension”) typically pay only a fraction of the amount a loss of earnings award (“LOE pension”) as compensation. The reality is that a denial of a loss of earnings pension can mean poverty for seriously disabled workers.

EXAMPLE
A worker earns $70,000 a year at a time when the WCB’s maximum insured annual rate of $60,000. The worker is seriously injured and has a PFI of 20%. The WCB deems that he is able to return to work part-time at a minimum wage job, earning $10,000 gross a year or $7,500 net. The figures below are approximate.

<table>
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<tr>
<th></th>
<th>Pre-2002</th>
<th>New Act/policy</th>
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<tbody>
<tr>
<td>PFI pension</td>
<td>$9,000</td>
<td>$8,100</td>
</tr>
<tr>
<td>LOE pension</td>
<td>$37,500</td>
<td>not eligible</td>
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<tr>
<td></td>
<td>(tax free)</td>
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Under the former Act, the injured worker would have a total annual income of $47,500, combining a $37,500 WCB pension (tax free) and $10,000 earnings. Even this was not “full” compensation for his loss due to the WCB maximum.

Under the new Act/policy, the injured worker would have a total annual income of $18,100 a year, combining a $8,100 WCB pension and $10,000 earnings. It is difficult to convince this worker that he has not suffered a “loss of earnings,” when his annual income has changed from $70,000 a year to $18,100 a year.
Worker’s Story: “John the Welder”
No Loss of Earnings Pension/ Multiple Appeals

John immigrated to Canada as a young man, with no English and very little formal education. He worked for over 30 years as a specialized welder, having been grandfathered into the welding system with a few specialized tickets, although he had no formal classroom training. His average earnings were $75,000 – $100,000 per year.

In 2004, John jumped from a work platform to avoid being crushed by a falling object and shattered his left elbow. At the hospital emergency room, he was left in a cast room for three days until a surgeon was available. The surgery was not successful and complicated his injury. Months later, he underwent a second reconstruction surgery which was also unsuccessful. John was left with chronic pain, arthritis, scar tissue, bone spurs and a misaligned elbow. His surgeon considered him “completely disabled from manual labour.”

Nonetheless, the WCB decided that he could return to work with some training and awarded him a 14.25% PFI pension or about $475 a month or $5,700 a year, with no assessment for a loss of earnings pension.

The vocational rehabilitation training did not seem genuine as John kept passing the course even when he was not able to do the work. In any event, the training aggravated his pain condition. When his doctor wrote that he should stop attending, the WCB terminated his VR benefits.

With his union’s support, these decisions were appealed. On the first appeal, the Review Division found that John was too disabled to do the work or the training identified by the WCB and returned the matter to the WCB for a new decision. The WCB then found AGAIN that John had the skills of a “Welding Supervisor” (even though this is a “hands on” position) and so was not entitled to a loss of earning assessment. This second appeal is now “on hold.”
With only a PFI pension of $5,700 a year and unable to work, John and his family experienced catastrophic financial distress. Although fearful of surgery, John decided to try an additional surgery to repair his left elbow so he could try to return to work. Unfortunately, this third surgery not only failed, but severed some additional nerves, including his radial nerve, resulting in severe palsy in his hand, wrist and fingers. John is now waiting for a new pension decision.
Worker’s Story: “Rose, the Mail Operator”
Low Back Pain/ Chronic Pain

Rose was leaning over, changing a 127 pound roll of paper when it slipped and she caught it while in a bent position. She finished her shift although her lower back became increasingly painful. The next day, she could not return to work and she has not been able to work for over three years. The worker describes her ongoing pain level as between seven and ten, on a ten-point scale. Rose 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 WCB has only accepted her physical injury as a temporary lumbar strain. Rose paid for a private MRI and on the basis of the results of the MRI, she was referred to a back specialist who diagnosed mechanical back pain with possible disc involvement and myofascial pain. The nature of her exact physical condition is still under appeal.

Early in the claim, the case manager made remarks which Rose understood to suggest that the pain was all in her head and she could get better “if she wanted to.” Rose developed a serious depression as a result of her condition and her feeling that WCB does not accept her pain as a real disability. The WCB has now accepted a permanent injury of chronic pain and psychological injury for a total of 33.4% PFI, of which only 2.5% is for pain. With her union’s assistance, Rose has gone through four appeals and is now waiting for an assessment for a loss of earnings pension.

OTHER WORKERS’ STORIES – A SUMMARY

- A paramedic developed Post Traumatic Stress Disorder after attending an accident which reminded her of her own son’s fatal accident. The WCB denied her claim on the basis that the triggering event was not “traumatic” under section 5.1 of the WCB Act.

- A truck driver was seriously injured in a motor vehicle accident. The WCB denied him a loss of earnings pension on the basis that he could still work as a
dispatcher, despite the fact that his primary language was Spanish. This is the subject of a Human Rights complaint.

• A 58 year-old lumber grader injured both of his shoulders and could not return to his job because it involved the constant use of his shoulder muscles to lift and turn lumber. The WCB accepted that he had chronic pain in his shoulders but said that pain alone should not prevent him from doing his job. After five years and seven appeals, a Workers’ Compensation Appeal Tribunal (WCAT) panel found that he should be assessed for a loss of earnings pension. The WCB resisted implementing this decision.