



Alberta Construction Association

August 29, 2017

Honourable Christina Gray

Minister of Labour

Transmitted via email: labour.minister@gov.ab.ca ; LBR.Communications@gov.ab.ca

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Dear Minister Gray:

The Alberta Construction Association appreciates the opportunity to continue to provide feedback on the review of the WCB. Alberta's construction industry contributes approximately 25% of annual WCB premiums, and at 3000 member firms, ACA is the largest provincial voice of Alberta's construction industry.

Implementation of the Panel's recommendations will seriously erode Alberta's WCB. Currently, Alberta's WCB features:

- Across Canada, the second highest 2017 maximum insurable earnings (at \$98,700) and the highest percentage of earnings benefits are based on (at 90%), combined with the lowest 20176 average assessment rate at \$1.02 (Source: Association of Workers' Compensation Boards of Canada, 2017). The current cap of \$98,700 net earnings is far higher than Alberta's average gross wage of \$58,000. The WCB Alberta formula provides for a cost of living adjustment to ensure the MIE covers the full wage of 90 percent of workers covered in the province.
- High levels of worker satisfaction with the fairness of WCB decisions (80.7% for 2011, 84.3% for 2012, statistic reporting changed for 2013 and 2014) (Source: Workers Compensation Board of Alberta, Annual Reports)
- More than 93% of injured workers achieved the fitness needed to return to work (Source: Workers Compensation Board of Alberta, 2013, 2014 Annual Reports)
- More than 80% of injured workers who used vocational services able to earn 75% or more of their pre-accident earnings (Source: Workers Compensation Board of Alberta, 2013, 2014 Annual Reports)
- A more than fully funded system, ensuring funds available to pay the future costs of current and prior-year claims

Taken as a whole, implementation of the recommendations of the WCB Review Panel would significantly reduce employer trust that the WCB provides fair compensation in a financially sustainable way:

- The wholesale change in focus is not justified given that at most 1.8% of claims require further review.
- ACA does not believe the Panel has achieved its purpose in ensuring a sustainable and affordable workers' compensation system.
- Recommendations 1-14 together have the potential to seriously undermine the independence of the WCB.
- Recommendations 22 and 23 create an additional obligation on employers with costs outside the WCB system that are not recognized by the Panel, and duplicate the mandate of Alberta's Human Rights legislation.
- Recommendations 27-40 undermine the Meredith principles of evidence-based decision-making and extend benefits beyond that which related to compensation for workplace injury.
- Recommendations 41-45 radically redefine the system away from an actuarially sound insurance program.
- Recommendations 46-51 impair the principle of objective, evidence-based decision-making and incent frivolous claims by both employers and workers
- Recommendations 58-60 fall outside the scope of the Review in proposing mandates beyond the purpose of the WCB.

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The Alberta Construction Association strongly supports implementation of Recommendation 24 (Government amend the Workers' Compensation Act and the WCB amend its policies to clarify that WCB will review a worker's level of continued benefits in situations where an employer terminates a returning employee for egregious acts), provided that the definition of such acts aligns with that contained in Alberta labour legislation. ACA does not support the recommendation for 4 weeks of benefit coverage as Employment Standards legislation is already in place to cover this as appropriate.

While the Panel did not specifically incorporate into a Recommendation, ACA supports the Panel's conclusion that:

"It is largely accepted that in today's economy typical worker will have multiple employers during their working lifetime, sometimes concurrently. In recognition of this it may be advisable for cost relief to be widely accessible to deal with matters such as repetitive stress injuries, where the injury is not attributable to a single employer" (page 108).

ACA does not support moving to fewer rate groups (page 108), as this reduces the incentive of higher risk segments to reduce claims.

ACA also supports the establishment of an employer appeals service independent of the WCB (recommendation 57).

More detailed comments are appended.

Sincerely,

A handwritten signature in blue ink that reads "Paul Heyens".

Paul Heyens, Chairman

cc. Premier Notley premier@gov.ab.ca

Positioning the System for the Future

The Panel's far-reaching proposals are not proportionate to the scale of any issues requiring improvement. The Panel acknowledges "the vast majority of claims are resolved by the workers' compensation system within two weeks" and that "Most claims go through the system smoothly, and in these cases workers and employers usually express high degrees of satisfaction with the system" (page 23). Indeed, the Panel reports that for 2016, there was 3,041 new review requests (page 121) on 163,718 total claims administered (page 165). Of the new claims, 4.8% were employer requests to apply cost relief (Page 122). At most then, there were 2,900 employee requests for review on 163,000 claims, or 1.8%. Of this 1.8%, the Panel provides no clarity as to how many are those with complexities giving rise to "more disagreements, reviews, and appeals in the system" (page 23). Given the latitude that the Panel proposes to give to the claims adjudication process, it is not evident to ACA that there will be fewer requests for appeals should the WCB be refocused. Further, there is no other WCB system across Canada that is claims-free, should this be the unstated goal of the Panel.

The Panel's arguments that the WCB is not insurance (page 21) are not persuasive. From an employers' point of view, the features of collective liability, claims experience rated premiums, actuarial soundness, evidence based decisions based on policy are features of an insurance program. At least some of the consultant's reports that the Panel relied upon¹ also describe the program as insurance. This distinction is important as ACA believes that implementation of a number of the recommended changes are contradictory, namely:

- The Panel noted a consistent response amongst all stakeholders of the value of evidence –based decisions and of transparency (page 28) as critical to trust in the program (page 24), yet the Panel accepts the argument that "the strict construction and interpretation of policies" (page 26) needs to be corrected through "collaboration, creative solution-making, and common sense" (page 26) and that "WCB policies will need to allow staff to use discretion" (p.11). ACA believes it will be impossible to maintain stakeholder trust without consistent application of evidence to clearly written policy, and that instead the system will become viewed as arbitrary and unfair.

ACA does not believe the Panel has achieved its purpose in ensuring a sustainable and affordable workers' compensation system. The Panel has not complied with employers' requests to share data and assumptions to allow for an independent assessment of financial sustainability. While Appendix H of the final report contains analysis by the actuarial firm Eckler of the cost impacts for several recommendations affecting benefits, the Panel has not done so for a number of recommendations, in particular:

- Recommendation 12: Establish a Fair Practices Office – is this taxpayer funded or through employer premiums?
- Recommendations 22 and 23: Provide that employers have an obligation to return injured workers to work including "the WCB has an obligation to support employers in returning workers to the workplace, and provide that the WCB will consider financial support in certain circumstances" (page 73).
- Recommendation 24: 4 weeks of benefits for terminated worker
- Recommendation 25: Amend the deeming process
- Recommendation 27: WCB examine the use of predominant cause and its impact to ensure it does not create an unreasonable threshold for eligibility
- Recommendation 29: Advise on potential changes (expansions) to Schedule B presumptive coverage
- Recommendation 31: Amend the definition of first responder to include additional occupations for the purpose of presumptive coverage for PTSD
- Recommendations 45: End the current practice of distributing surplus money from the Accident Fund to employers
- Recommendation 46: WCB should not seek return of overpayment of health benefits

¹ White Paper on the use of administrative data for prevention

- Recommendation 47: WCB should not seek return of overpayment of interim relief
- Recommendation 56: Provide for representation at judicial review supported by the OAA

It is critical that a transparent and full sharing of the cost impacts of each recommendation is shared with stakeholders for feedback prior to any implementation. The Panel has failed to identify and model cost reductions alluded to on page 10 of the report.

Shifting the Service Culture

Taken as a whole, Recommendations 1-14 have the potential to seriously undermine the independence of the WCB, with the Government establishing the mandate of the WCB Directors (Recommendation 3), determining, in place of the Board, the committee structure (Recommendation 4), removing the CEO from the Board (Recommendation 5), creating a Secretariat to provide advice to the Board separate from the CEO (Recommendation 6), establishing a Fair Practices Office that has the potential to interfere with evidence-based decision-making (Recommendation 12), introduces without justification new players and processes to the WCB system (Recommendation 13), and introduces a statutory review cycle with so great a frequency as to create uncertainty and confusion in what is already a complex system (Recommendation 14). ACA does support greater stakeholder involvement in Board recruitment and in identification and dialogue in review of WCB policies.

Taking a Better Approach to Health

Timely treatment is critical to meaningful rehabilitation of injured workers. Implementation of Recommendation 18 to enable injured workers to initiate the medical panel process needs to be revisited to ensure the WCB retains control of the decision to convene the medical panel. The mandate of a Fair Practices Office could encompass review of whether the WCB correctly applied the decision criteria.

Supporting Return to Work Realistically

Recommendations 22 and 23 create significant challenges for employers in providing a duty to accommodate injured workers return to employment which should remain solely within the mandate to Alberta's human rights legislation. Two separate legislative processes create complexity and cost for the employer, and discriminate against uninjured workers in that the employer cannot offer similar employment guarantees.

Providing Benefits with a Supportive Focus

Taken as a whole, this group of recommendations undermine the Meredith principles of evidence-based decision-making and extend benefits beyond that which related to compensation for workplace injury.

The Meredith Principles, which are the tenets upon which the Canadian workers' compensation systems were built, require that decision-making be based on evidence, law, policy and a fair, impartial and transparent process. Implementation of presumption legislation is in contradiction of these basic fundamental principles. The following Standard, which is recognized by epidemiologists and toxicologists among other professions, be applied in consideration of any expansion of presumptive legislation:

*Strong and consistent epidemiological evidence exists that **in virtually every case** the disease occurrence is linked to a single cause and that cause is associated with an occupation, workplace or work process.*

Must have definitive finding of a causal association, as well as a strong statistical association. The aim is to ensure that in virtually every case, workers will have developed their diseases as a result of the occupational processes. Evidence of non-work exposure that would override the work exposure is not expected to exist in individual claims in practice.

Determining a causal relationship (link) between an illness/injury and the workplace is necessary for all claims made to the WCB. It is the WCB's administrative responsibility to investigate all the evidence provided, apply the law and render a decision. In recognition that not all situations are straightforward, the "Benefit of Doubt" policy is fair and reasonable when considered within the context and interpretation provided, and when properly applied. However, it is imperative this not be used as a substitute for lack of evidence, or in a purely speculative sense, or when the issue can be decided on the balance of probabilities.

In order to accept a claim, the WCB must establish a nexus between a work activity being performed and the injury/illness. To facilitate timely and accurate adjudication, the involvement of the employer is essential prior to an entitlement decision being made. The evidence based determination must support that the claim arose during employment and is related to employment duties, not simply that the incident occurred in a workplace. The purpose of employer consultation would be to ensure the WCB has all the relevant information the employer is aware of regarding the worker, the workplace and the work duties. Adjudicators must understand the actual work the injured worker was performing at the time and conduct a thorough investigation into both current medical and pre-existing conditions. This consultation step in complex claims will avoid situations where an entitlement decision is made based on an assumption by the WCB rather than fact, and minimize the need for an employer appeal because not all information was considered. Employers must also be afforded sufficient time when dealing with complex claims to obtain expert medical opinion where warranted.

Keeping the System Sustainable

This group of recommendations provides for the WCB to set premium rates, maintain the "Green Zone" for funding the Accident Fund, and keep all the money received from employers. Other recommendations from the Panel take WCB into social programs and safety programs, all paid for by employers. This is a radical departure from an actuarially-based insurance program.

Strengthening Reviews and Appeals

Consistent interpretation and application of evidence to clearly written policy will strengthen stakeholder trust in the WCB. The Appeals Commission must continue to apply its rigorous approach as an administrative justice tribunal.

Supporting Prevention of Injuries and Illnesses

Funded safety associations were driven by the employer community, with ACA creating the first with Alberta Construction Safety Association in the 1980s. The levy collected was not a consequence of Justice Meredith's work establishing the principles of workers compensation. There is no role for government oversight of the work of funded safety associations.

Comments on specific recommendations

Recommendation 6 : Establish a Secretariat within the WCB organization that is dedicated to supporting the WCB Board of Directors and can provide the Board with access to independent resources

ACA is concerned that rather than strengthen the operations of the Board, implementation of this recommendation blurs the lines of transparency and accountability. How can senior management be held accountable if the Secretariat operated independently of the senior management team? In effect, the Board would now have two separate and independent support systems. Other Boards employ mechanisms exist such as independent members on the Audit Committee. The Panel's recommendations to ensure an obligation of stakeholder input to the Board committees should also help provide the Board with independent perspective.

Recommendation 12: Establish a Fair Practices Office for Alberta's workers' compensation system which plays roles similar to fair practices offices in other provinces

ACA understands that the Fair Practices Advocate in Manitoba judges whether the decision-maker was impartial and open-minded and/or exercised appropriate discretion. The Manitoba mandate also includes the authority to change claim decisions. The Meredith Principles, which are the tenets upon which the Canadian workers' compensation systems were built, require that decision-making be based on evidence, law, and policy. ACA opposes introducing subjective opinions into the decision making process to address a perceived lack of fairness as this violates the Meredith principles.

Recommendation 18: Amend applicable legislation and policies to enable injured workers to initiate the MPO's medical panel process when there is disagreement in medical opinion about their claim.

ACA supports the current provisions that allow only the WCB or Appeal Commission to request that a Medical Panel be convened. There must continue to be a structured process in place to ensure that issues put to a Medical Panel are bona fide differences in *medical opinion on a medical matter* and to ensure the panel process is not misused. Given the specialized nature of physicians serving on a medical panel, the draw on the time of panel members, the length of time it takes to convene a panel of specialists and the costs associated with convening a medical panel having a mechanism to verify appropriateness of a panel is critical. Timely treatment aids in meaningful rehabilitation of injured workers.

Panels are generally necessary where there is a conflict of medical opinion between two physicians of equal expertise or speciality, or to answer a medical question necessary to determine entitlement that cannot be determined through other means. However, panels should not be used where there are other methods for resolving a difference in medical opinion and this could become the case if anyone was able to request a panel.

ACA supports introduction of a formal mechanism that allows either the employer or the worker to request, through the WCB, that a medical question be put forward to a Medical Panel for review. Requests from either stakeholder would be submitted to the WCB and should be supported with a statement of the facts and reasons for the request. The request should not automatically trigger a panel.

The WCB would be responsible for reviewing the request and confirming whether criteria for a referral are met. As part of the process, the WCB would verify that the *medical opinion on a medical matter* expressed by the injured worker's treating physician(s) is based on all relevant medical information available. A medical opinion must include a full statement of the facts, medical evidence and reasons supporting a medical conclusion.

To ensure trust in the system, the mandate of the Fair Practices Office could include a review that the WCB correctly

applied the criteria.

Recommendation 22: Amend the Workers' Compensation Act to provide that employers have an "obligation to return to work" those workers who suffer injuries and illnesses in their workplaces and

Recommendation 23: WCB implement a new policy that establishes a more collaborative approach which also enforces the obligation to return and injured worker to work.

Effectively employing a Duty to Accommodate for employers adds a new level of responsibility to the employer, where implications for not having available work go beyond the financial implications; they become a legislated right. This duplicates mandate within Alberta's human rights legislation, creating complexity for workers and employers in navigating two parallel legislative approaches. The recommended requirements of the obligation existing for 24 months following the date of the accident, and continuing until the worker has been back at work for 12 continuous months discriminate against uninjured workers for which the employer cannot provide similar guarantees.

Recommendation 27: WCB examine the use of predominant cause and its impact to ensure it does not create an unreasonable threshold for eligibility

The nature of psychological injury is different than physical injury so it is appropriate that the standard be different. Meredith principles must be applied in claims involving psychiatric and psychological injuries, and in making entitlement decisions a clear link to a work related incident must be established.

Establishing causation is a challenge because most mental health issues are multi-factorial. Mental health issues often evolve from individual life circumstances and reactions to specific events, combined with varying daily stressors. The very reason a causal relationship is hard to draw between mental health issues and employment is because in many cases employment is merely the location where issues become evident. In *Martin v Alberta WCB*, the Court of Appeal upheld WCB policy that excludes stressful employment factors considered to be normal pressures and tensions experienced by workers in similar occupations and conditions. Often employment is coincidental with the onset of systems and not necessarily the cause. It is essential the workers' compensation system and employers not absorb the cost of mental health care for disability due to a multitude of non-occupational mental health conditions that appropriately should be borne by the public health care system.

Recommendation 30: Government amend the Workers' Compensation Act to enable the Appeals Commission to take note of commonly-seen linkages between certain types of injuries or illnesses and certain types of employment.

This recommendation takes the WCB in a direction approaching presumptive coverage based on numbers of claims of a specific type in a specific industry and moves away from decision-making based on the specifics of the issues under appeal.

Recommendation 31: Amend the definition of "first responder" in the Workers' Compensation Act for the purposes of presumptive coverage for PTSD to include additional occupations.

The WCB should rely on scientific evidence rather than what is played out in the media.

Recommendation 34: Establish a special graduated benefit for workers whose wages place them in excess of the maximum insurable earnings range.

No other province has a comparable benefit. Implementation runs the risk of creating inequity, someone on WCB benefits should not be earning more than coworkers who experience a wage drop in an economic downturn.

Recommendation 35: Introduce a lump sum payment in recognition of an injured worker's death in the amount of \$40,000.

This recommendation adds a life insurance element to workers' compensation. How many of the occupational disease fatalities are seniors who no longer qualify for life insurance because of age? If the Government accepts this recommendation, late onset occupational disease related fatalities should be excluded.

Recommendation 37: Provide cost-of-living adjustments based on the actual Alberta Consumer Price index, without any reduction

ACA supports the current approach of the WCB, which is based on work prepared for the Bank of Canada that the CPI overstates actual costs as actual expenditures reflect decisions to substitute lower priced goods than that priced in the CPI basket of goods.

Recommendation 38: Provide the ability to adjust the benefits of young workers to mitigate the hardship they might otherwise experience

There is no evidence presented that a permanent loss of earnings is typical. This recommendation discriminates against non-injured workers that have no such guarantee of a steady progression of growth in future earnings.

Recommendation 40: Amend the Workers' Compensation Act to establish a requirement that an injured worker continues to be covered under their existing health benefits program.

ACA opposes this recommendation as statutory overreach. The Government should not have the power to effectively rewrite the terms of agreement between employers and their benefits providers. This potentially large cost has not been considered in the costing of recommendations.

Recommendation 41: WCB Board establish an independent study on the process that should be used by the WCB to establish employer rates fairly.

The Panel asserts but presents no evidence of claims suppression to argue that experience rating leads to claims suppression. This lack of an evidence-based approach by the Panel erodes trust in their Report. The three party reporting system (employer, worker, physician) reduces the likelihood of claims suppression. Alberta WCB has noted that employer misunderstanding of the requirement to report no lost time claims is much more of an issue than deliberate claim suppression.

The benefit of experience rating is to introduce individual employer accountability into a collective liability system. Performance surcharges incent a reduction of injuries through improved safety management.

Recommendation 42: WCB maintain the current target range of the Accident Fund

ACA supports this recommendation provided that Recommendations 44 and 45 are not implemented. If the WCB retains every dollar provided by employers, the Panel has essentially dismantled the concept that current premiums are actuarially set to cover the current and expected future cost of current claims. In turn, this seriously erodes employer trust of the fairness of the system between employers across different time periods.

Recommendation 43: WCB undertake a review using an independent resource on how the investment of the Accident Fund can best be managed in accordance with the Funding Policy that is established by the WCB
Employer funding should remain independent from funds managed on behalf of the Government of Alberta. This

minimizes the potential for Government providing direction for purposes beyond WCB.

Recommendation 45: End the current practice of distributing “surplus” money from the Accident Fund to employers. Establish a new policy for the use of excess Accident Fund monies (ie. When the Accident Fund exceeds its target range) which respects the unique purpose of these monies. Our Panel recommends those surplus funds (from the 2016 assessment year) be used to offset any increases to employer assessments that might be caused by the implementation of our Panel’s recommendations.

The recommendation to use the surplus from the 2016 assessment year contradicts the Panel’s desire for accountability, transparency, and sustainability. The Panel notes the Alberta system “is doing well compared to many of its counterparts across the country”, including that “financial decisions are informed by actuarial data and analysis rather than politics and conjecture” (page 11). The Panel further acknowledges “the WCB has become extremely adept at forecasting the assessments it requires from employers to pay for current and future claims costs. Over time, the difference between the amount it has collected from employers and the amount actually required for claims costs has been shrinking” (page 113). In order to maintain these principles and performance, future policy change needs to be fully reflected in future premium rates and hence should not use the 2016 surplus to fund proposals going forward. WCB British Columbia has confirmed that surplus funds in that province are employers’ money. (<https://news.gov.bc.ca/releases/2017JTST0107-000921>).

Recommendation 47: WCB provide interim relief to workers and employers while their matters are under appeal

Without a reimbursement of interim relief, this recommendation incents employers and workers to appeal every decision. The cost implications are potentially enormous.

Recommendation 49: The Appeals Commission encourage the use of an alternate dispute resolution mechanism as an option in the appeals process, making use of case conferencing and other approaches that help achieve early and effective resolution of matters under appeal.

The entire review and appeals process needs to be governed by evidence consistently applied to clearly written policy. Stakeholders can only be confident if the Appeals Commission continues to act as a quasi-judicial process.

Recommendation 56: Provide for representational judicial review supported by the OAA.

The Office of the Appeals Advisor replaces the need for legal representation. Should parties feel the need for further representation, it should be at their expense.

Recommendation 58: Safety associations funded through WCB-collected levies should receive their grant installments from WCB only after satisfying oversight requirements established and delivered by OHS.

The WCB collects employer funds for this purpose. The fact that the WCB acts as the collector should not mean that government has a role in dictating the use of those employer funds.

Recommendation 59: OHS and WCB jointly establish a working group featuring representation from employers, workers, the WCB and OHS, to examine issues and make improvements to the collection and use of data related to workplace injuries and illnesses.

ACA is interested in working with OHS on the value of leading indicators to prevent injuries. By definition, WCB data are lagging indicators.



Recommendation 60: Amend the Workers' Compensation Act as required to give the WCB authority to collect information relevant to the prevention of workplace injuries and illnesses and to disclose such information to OHS.

ACA understands that Alberta's privacy legislation requires the WCB to seek the consent of affected parties in situations where information was collected for one statutory purpose and is proposed to be used for a different purpose. If the Government proceeds with this Recommendation, ACA will seek to ensure the WCB follows this requirement.