Consultation Report on Potential Amendments to the British Columbia *Workers Compensation Act*

Jeff Parr

February 2020

Introduction

This report was prepared for the Minister of Labour to provide stakeholder feedback on potential amendments to the *Workers Compensation Act* ("*Act*") arising from three recent independent review reports on the workers compensation system in British Columbia, as well as my observations and recommendations on updates to the *Act.*

The three independent review reports are:

- *Restoring the Balance: A Worker-Centered Approach to Workers' Compensation Policy* (Paul Petrie), April 25, 2018.
- *Balance. Stability. Improvement. Options for the Accident Fund* (Terrance Bogyo), December 6, 2018.
- *WorkSafeBC and Government Action Review: Crossing the Rubicon* (Lisa Jean Helps), August 2019.

The reports by Terrance Bogyo and Lisa Jean Helps made specific recommendations to Government on potential changes to the *Act.* The report by Paul Petrie made recommendations to WorkSafeBC for policy changes, some of which raised issues that may be better addressed by amendments to the *Act*. From these review reports, 14 proposals on potential changes to the *Act* were identified for consideration.

I was asked to engage stakeholders in developing a consultation plan that would meet Government's need for timely input on potential amendments to the *Act* while addressing stakeholders' request for meaningful consultations. Upon approval of the consultation plan, I consulted employer and labour stakeholders and sought input from representatives of Indigenous organizations.

It is important to stress this undertaking is not intended to be a comprehensive review of the workers' compensation system or legislation. The scope of the consultations and this report is limited to 14 proposals for potential amendments to the *Act*. As such, there are issues and concern to both labour and employers that are out of scope.

Employer and labour representatives were conscious of the costs associated with the proposals, and understood many proposals would drawdown WorkSafeBC's $2.6 billion excess surplus. They were also advised of the ongoing effect of each proposal on WorkSafeBC premium rates going forward.

When providing their feedback on the proposals, employer and labour representatives took into account how proposed changes aligned with provisions in other Canadian jurisdictions, the implications for WorkSafeBC's excess surplus, and the effect on future employer premium rates.

All representatives were cautioned, that it was unlikely all 14 proposals could be recommended for implementation. When considering changes to compensation and

benefits, employer and labour representatives advised priority should be given to the proposals that would benefit injured workers and their families the most.

The First Nations representative consulted, is philosophically supportive of improved compensation and benefits to injured workers and their families, provided the changes are sustainable and do not impose a significant burden on employers. He also supports smoothing any increase in premium rates over time to ease the transition.

I want to thank Doug Alley, Managing Director of the Employers' Forum and Laird Cronk, President of the BC Federation Labour for their efforts to coordinate input from the employer community and the labour movement. Thanks also to the labour, employer, and Indigenous representative who participated in these consultations, and provided thoughtful and constructive feedback. Thank you to the Executive and staff of WorkSafeBC for providing information and answering my questions, and to the Ministry of Labour for their analysis and feedback on the proposals under consideration.

Finally, I want to thank Louise Kim, Senior Manager at WorkSafeBC's Policy, Regulation & Research Division for her invaluable assistance, patience and advice during the course of this review. I cannot imagine how it could have been done without her contribution.

Summary of Observations and Recommendations:

When formulating my observations and recommendations, I was conscious they are intended to help the workers' compensation system become more worker-centric while retaining the confidence of workers and employers.

My observations and recommendations are derived primarily from the input and advice from stakeholders. For proposals where no consensus could be found, I gave careful consideration to factors such as:

- effects on injured workers and their families;
- effects on the stability and sustainability of the workers compensation system in British Columbia;
- ongoing effects on premium rates paid by employers and the business climate of British Columbia;
- comparability of compensation and benefits with other Canadian jurisdictions; and
- comparability of the average premium rate with other Canadian jurisdictions.

With that in mind, I recommend the following changes to the *Act*:

1. Amend the *Act* to clarify oversight and approval to commence OHS prosecutions rests with the leaders of the OHS Division of WorkSafeBC.
2. Amend the *Act* to include search and seizure powers, appropriate for investigation of workplace incidents for prosecution purposes by giving WorkSafeBC Investigators the power: • to obtain a judicially authorized search warrant, and seize evidence in accordance with the warrant; • test or take samples that may afford evidence of a contravention or offence; • obtain a telewarrant; • obtain a judicially authorized warrant to search computer hard drives that may afford evidence of a contravention or offence; • seize documents that may afford evidence of a contravention or offence; and • issue production orders.
3. Amend the *Act* to allow for the courts to consider victim impact statements during sentencing.
4. Amend the *Act* to set the maximum insurable earnings at $100,000 per year, and delegate authority to the Board of Directors to adjust the maximum insurable earnings, from time to time, so that at least 90 percent of workers have coverage for all of their earnings.
5. Amend the *Act* to provide authority to WorkSafeBC to make a final determination of the retirement age of an injured worker at a point when the worker is approaching normal retirement age.
6. Amend the *Act* to make the annual cost of living adjustment equal to full CPI, going forward. The amendment should also: • retain the current 0 percent floor and 4 percent cap on cost of living adjustments; • provide WorkSafeBC authority to apply a cost of living adjustment of up to 1 percentage point less than CPI if the funding level of WorkSafeBC is less than 100 percent (when full CPI is less than 5 percent); • provide WorkSafeBC authority to provide periodic adjustments to restore any deferred CPI increases when the funding level of WorkSafeBC is above the target capital adequacy level; and • provide WorkSafeBC authority also to exceed the 4 percent cap when periodic adjustments are required to restore deferred CPI.

7. Amend the *Act* to add new powers to improve the ability of WorkSafeBC to secure funds owed by delinquent and bankrupt employers by:

   - making explicit provision for director's liability;
   - strengthening provisions for levying unpaid assessments on successive employers; and
   - adding authority for collection officers to issue a "requirement to pay".

   Consideration should be given to include a directors' liability shield, similar to Quebec's section 323.3, for those directors who, in the circumstances, exercised a reasonable degree of care, diligence and skill, or could not have been aware of the non-payment of assessments.

8. Amend the *Act* to give WorkSafeBC authority to pay health care expenses before claim acceptance on a "without prejudice" basis in cases where timely treatment is likely to lessen or prevent more serious harm or disability.

9. Amend the *Act* to provide WorkSafeBC authority to develop policy clarifying when the one-year time limit for filing an application for compensation commences for mental disorders claims.

10. Amend the *Act* to eliminate the threshold for determining when the loss of earnings ("LOE") method should be used instead of the loss of function ("LOF") method for calculating a worker's permanent partial disability award, and require WorkSafeBC to calculate a worker's permanent partial disability award using both the LOE and LOF method. The disability award payable would be based on whichever method provides the greater amount of compensation.

In addition to recommendations for legislative change, I offer the following observations arising out of these consultations.

Workers' compensation legislation in the three Prairie Provinces require a periodic review of the system and legislation. That merits consideration in British Columbia. Given the relationship of labour and employers to the system, dating back to Meredith and the historic compromise, it would be advisable for future reviews of the system and legislation to be undertaken by a tripartite panel with equal representation from employers and labour, and an independent chair. The panel should consult employers and labour, other interested stakeholders, and Indigenous organizations.

If all of the recommendations in this report are implemented, and action is not taken to offset the effect on premiums, the average premium rate would increase 6.6 cents, from $1.55 per $100 payroll to slightly less than $1.62. About $740 million would also be drawn down from the $2.6 billion excess surplus.

There would be some additional costs due to the interactive effect of an increased cap on maximum insurable earnings and full CPI cost of living adjustments; in addition, the

costs for some proposals could not be reliably estimated. WorkSafeBC would also incur implementation and operational costs.

To facilitate improved compensation and benefit for workers, and address the effect on employer costs and the business climate, serious consideration should be given to continue allocating some of the excess surplus to subsidize premiums and to smooth the increase over time. In general terms, consideration should also be given to allocating excess surplus, now and in the future, in a manner that benefits workers as much as it benefits employers, while supporting a sustainable workers compensation system. It would be beneficial to consult labour and employer stakeholders when determining how that should be done.

Consultation Process

This was a targeted stakeholder consultation initiative, focused on 14 proposals for potential changes to the *Act* to address recommendations from the three independent review reports by Paul Petrie, Terrance Bogyo, and Lisa Jean Helps.

The recently completed review by Janet Patterson was out of scope for these consultations. In addition, policy and/or operational changes required to address recommendations from the three reports were also out of scope.

The consultation plan was developed with input from employer and labour stakeholders. It was supported by the Employers' Forum and the B.C. Federation of Labour, and was approved by the Minister of Labour.

There were two main consultation tables. One was made up of employer representatives coordinated by the Employers' Forum. The other was made up of Labour representatives coordinated by the B.C. Federation of Labour.

At the request of the B.C. Federation of Labour, one side table consultation meeting was organized for representatives of the B.C. Nurses Union and Unifor. I met separately with each table.

Additionally, in recognition of the B.C. *Declaration on the Rights of Indigenous Peoples Act* and its aim to create a path forward that respects the human rights of Indigenous peoples while introducing greater transparency and predictability in their interaction with government, the Ministry of Labour requested The Minister's Advisory Council on Indigenous Women, and the British Columbia First Nations Health Authority be invited to participate.

With a number of other priority issues before it, at the time of this writing, The Minister's Advisory Council on Indigenous Women was unable to participate. However, the British Columbia First Nations Health Authority participated in a dedicated consultation meeting.

Attached as Appendix A is a list of the representatives who participated in consultation meetings.

Prior to meeting, representatives were provided with a brief explanation and a preliminary cost analysis for the 14 proposals under consideration. Additional information, including jurisdictional comparisons were also provided during consultations.

Over the course of the consultations, I maintained ongoing contact with the Ministry of Labour and WorkSafeBC, to update them on current and planned activities, to ensure accurate information was provided to stakeholders, and to gain an understanding of the operational implications of the 14 potential changes being considered.

Employer and labour representatives participated actively and thoughtfully in the consultations. They were well informed about the workers' compensation system, the substance and effects of key 2002 amendments to the *Act,* and the financial position of WorkSafeBC.

Both employer and labour representatives appeared to accept the rationale behind WorkSafeBC policy requiring its funded position to be not less than 130 percent of all liabilities. They were aware, too, that as a result of strong investment returns, the current funding level sits at about 150 percent, yielding an excess surplus of approximately $2.6 billion.

At the outset, both employer and labour representatives wanted to provide some general comments for Government to take into account when making decisions on changes to the *Act.*

Labour

Labour representatives were mindful of the 2002 legislative changes which addressed an emerging unfunded liability by reducing compensation and benefits. As a consequence, injured workers and their families saw an increase in their share of the financial burden of work-related injury, disease and death.

They also note that as the funding position of WorkSafeBC strengthened, employers benefited from a reduction in the average assessment from more than $2.00 per $100 of payroll in 2002 to $1.55 in 2018, a decrease of more than 22 percent. While this was driven largely by the improved financial position of WorkSafeBC, it was also driven by a Board of Directors decision to subsidize employer assessments. According to Bogyo, from 2007 to 2018, the value of the subsidy was approximately $1.8 billion.
Injured workers and their families, the labour representatives note, did not receive a similar distribution of benefits as the funding position strengthened. The legislative provisions reducing compensation and benefits remained unchanged.

While labour representatives agreed to participate actively in these consultations and provided sincere and meaningful feedback, they were disappointed the scope of the consultations was limited to 14 potential changes to the *Act* addressing recommendations from only three of the four independent reviews. They advised they are looking for greater improvements to the system than contemplated by the 14 proposals under consideration at this time.

In particular, they are very concerned the Patterson Report was not part of these consultations. Without the ability to consider Patterson's more comprehensive review, they said, they could not see the full picture when providing feedback on these 14 proposals.

They are also concerned that by supporting potential changes within the scope of these consultations, and consequently drawing down the excess surplus, there may not be sufficient surplus left to address other important changes that may be recommended by Patterson.

When considering changes to compensation and benefits, labour representatives think priority should be given to those proposals that benefit the greatest number of injured workers and their families, and those hardest hit by reductions introduced in 2002.

The labour representatives also suggested the following legislative changes to help address claim suppression, strengthen consideration of merits and justice in claims decisions, and better address occupational diseases with a long latency period. The cost of these changes, they said, would be "next to zero dollars".

- Amend s. 151 to allow discriminatory action complaints if there is retaliation against a worker for exercising any right under the *Act* (including applying for compensation), not simply for exercising a right under Part 3 of the *Act.*
- Amend s. 253.1 and possibly s. 256 to restore the ability for the Worker Compensation Appeal Tribunal ("WCAT") to reconsider a decision on common law grounds.
- Amend s. 99(2) and s. 250(2) so that policy is not binding.
- Amend s. 96(2) and (5) to allow WorkSafeBC to reconsider any decision at any time based on new evidence.
- Amend s. 6(3) to remove the words "at or immediately before the date of the disablement". If the presumption for a particular occupational disease requires a temporal connection, they said it should be restricted to that disease and set out in Schedule B.

Finally, they point to the long held view of the British Columbia labour movement, that the name "WorkSafeBC" should revert back to Workers' Compensation Board (WCB) to more accurately reflect the nature of the organization.

Employers

Employer representatives note the 2002 legislative amendments were made to preserve the workers' compensation system, and that the changes to compensation and benefits brought British Columbia in line with other jurisdictions at the time.

They emphasize the system is not broken. The majority of workers' claims are dealt with quickly and fairly, the system is fully funded, and prudent investments have generated a significant surplus.

This undertaking, they said, may be an opportunity to make some thoughtful changes to the workers' compensation system in British Columbia, but it is not about overhauling the whole system. They stress their concerns are not "all about the money." The outcome needs to be fair to injured workers, and legislative changes should provide benefits comparable to other Canadian jurisdictions, and "not on the low side". Expecting Government to respond to demands for improved compensation and benefits, they maintain care must be taken to ensure the sustainability and stability of the workers' compensation system.

They are particularly opposed to any consideration of retroactive changes, noting the 2002 amendments responded to circumstances as they existed at that time. They pointed out the large price for any retroactivity would be paid by current and future employers who have no responsibility for past claims, or for amendments made in 2002.

Employer representatives also caution against simply spending all of the excess surplus now, noting in the near term, more complex claims, including mental health claims and dramatically rising health care costs, are expected to add about $200 million annually to claims costs. Recalling the severe market decline in 2008-09, they also note the ongoing need to retain sufficient surplus to cushion against future market declines.

When considering legislative changes to compensation and benefits, they say priority should be given to sustainable items that benefit the most people. Some excess surplus should also be allocated to smooth any employer rate increases over time, and consideration should be given to setting aside some surplus for prevention initiatives, something that would benefit both workers and employers.

They stress, in particular, that Government must take into account the cumulative effects of recent changes it has made on the costs of doing business and the business climate in British Columbia. They draw attention to a number of recent changes, including minimum wage increases, labour standards and labour relation changes, stronger environmental protection requirements, Medical Service Plan premiums levied on employers, corporate tax increases, and rising property taxes.
Of particular concern are the effects on small business; about 90 percent of British Columbia employers have fewer than 20 workers. They point out small businesses operate on tighter margins, and are less able to absorb additional costs or deal with greater regulatory complexity.

They advise there is palpable anxiety in the business community that “the best days are behind us.” They note that while the British Columbia economy has done well for a number of years, there are indications things are starting to change. They point to declining employment since the mid-point of 2019, and projections that year-to-year job growth will be flat. They also note that a more difficult business climate in British Columbia will exert downward pressure on employment.

In that context, they note WorkSafeBC premiums have been stable in recent years. They say if amendments cause employer assessments to increase dramatically, that would be unpalatable and problematic for the employer community. Whatever government ultimately decides, they argue, if it leads to increased employer assessments, then it is absolutely critical to allocate some excess surplus to smooth the increase over time. This will be particularly important to industries like construction that require cost certainty when tendering for work on multi-year projects.

Potential Changes to the *Act*

1. Oversight and approval of the Board for referral of Occupational Health and Safety (“OHS”) charges

Proposal: Amend the *Act* to remove oversight and approval by the Board (“WorkSafeBC”) for OHS charges.

A prosecution is commenced when an information is laid. WorkSafeBC refers an investigation file to Crown counsel who then decides whether or not to lay charges.

Section 214(2) of the *Act* states an information in respect of an offence may only be laid with the approval of the Board. The *Act* defines Board to mean the Workers’ Compensation Board (WorkSafeBC).

By policy, authority to approve the commencement of a prosecution under section 214(2) is assigned by the Board of Directors to the President/CEO. It may not be delegated by the President/CEO further without approval by the Board of Directors.

Helps notes that before an information can be laid with the Crown, it goes through the OHS gatekeeper, and ultimately through the CEO, who holds the delegated powers of the Board of Directors. This adds an unnecessary step in OHS prosecutions, and introduces the potential appearance of bias. Like OHS Agencies across Canada, Helps finds WorkSafeBC’s OHS Director of Investigations together with investigators have the knowledge and experience to make appropriate decisions about whether or not to commence a prosecution.

Board of Director/CEO approval to commence a prosecution is unusual in Canadian OHS law. Typically, recommendations to the Crown for prosecution are made independently by the regulatory authority, without intervention from the administrative or political head of the organization.

There are only three jurisdictions, including British Columbia, that require consent or approval to commence an OHS prosecution. In the case of the federal government, no prosecution can be commenced without consent of the Minister or Minister's designate. In Yukon, a prosecution can only be commenced by the "Director" which is defined to mean the safety officer who is designated by the board as the Director of Occupational Health & Safety.

The cost implications of this change would be negligible.

Stakeholder Response:

There was consensus among employer, labour and Indigenous representatives that the OHS Division of WorkSafeBC should not require approval by the President/CEO or Board of Directors to commence a prosecution. Authority to commence a prosecution should rest with the OHS Division.

Employer representatives emphasize there is an ongoing need in OHS regulatory enforcement agencies for rigour and oversight on enforcement activity, especially decisions to refer potential prosecutions to the Crown.

Observations and Recommendation:

The need for rigour and oversight on enforcement activities including prosecution is worth emphasizing. However, that oversight should more appropriately rest with the OHS leadership of WorkSafeBC. WorkSafeBC advises that its OHS leadership already exercises careful oversight over enforcement activities and prosecutions. That would continue if approval is no longer required by the President/CEO to commence a prosecution.

It's important to stress that it is not the *Act* that requires approval by the President/CEO to commence a prosecution; it is policy of WorkSafeBC. A policy change could effectively deal with the concern behind this proposal. That said, if there is a desire to hardwire the policy change in legislation, the amendment should clarify oversight and approval to commence OHS prosecutions rests with the leadership of the OHS Division.

Recommendation: Amend the *Act* to clarify oversight and approval to commence OHS prosecutions rests with the leaders of the OHS Division of WorkSafeBC.

2. Search and Seizure powers for prosecution purposes

Proposal: Amend the *Act* to include search and seizure powers, appropriate for investigation of workplace incidents for prosecution purposes, by giving WorkSafeBC Investigators the power:

- to obtain a judicially authorized search warrant, and seize evidence in accordance with the warrant;
- test or take samples that may afford evidence of a contravention or offence;
- obtain a telewarrant;
- obtain a judicially authorized warrant to search computer hard drives that may afford evidence of a contravention or offence;
- seize documents that may afford evidence of a contravention or offence; and
- issue production orders.

While the *Act* does contain search and seizure powers for inspections and investigations that may lead to orders or other regulatory enforcement actions, it does not authorize search and seizure for prosecution purposes.

For prosecution purposes, a warrant to search and seize must now be obtained under the *Offence Act* rather than the *Workers Compensation Act.*

Identifying when an officer's inquiries are predominantly for prosecution purposes has been an important consideration for OHS Agencies in Canada since a 2002 Supreme Court of Canada decision (*R*. v. *Jarvis*).

Only three other jurisdictions have warrant provisions for prosecution purposes in their OHS legislation. (In two of the three jurisdictions, those provisions pre-date the Supreme Court of Canada's *Jarvis* decision).

While there will be a small increase in operating costs for WorkSafeBC, about $1.8 million annually, the effect on average premiums will be small, in the order of 2/10 of a cent per $100 of payroll.

Stakeholder Response:

There was consensus among employer, labour and Indigenous representatives to support this change.

Labour representatives sought assurance that adding these search and seizure powers would not restrict the authority WorkSafeBC inspectors already have for non-prosecution purposes.

Both labour and employer representatives emphasize training for officers will be critical to ensure consistency and the appropriate use of these new powers.

Employer representatives are supportive of the proposed amendment, provided the new search and seizure powers are to be used for investigations that may lead to prosecutions for offences under the *Act*.

Observations and Recommendation:

These would be new search and seizure powers specifically for prosecution purposes. Proper training for officers will be essential to ensure consistency and appropriate use of these powers. WorkSafeBC advises if changes were implemented, there would be training and careful oversight to ensure these new powers were used appropriately and consistently.

Recommendation: Amend the *Act* to include search and seizure powers, appropriate for investigation of workplace incidents for prosecution purposes giving WorkSafeBC Investigators the power:

- to obtain a judicially authorized search warrant, and seize evidence in accordance with the warrant;
- test or take samples that may afford evidence of a contravention or offence;
- obtain a telewarrant;
- obtain a judicially authorized warrant to search computer hard drives that may afford evidence of a contravention or offence;
- seize documents that may afford evidence of a contravention or offence; and
- issue production orders.

3. Victim Impact Statements and Court Orders for Publication

Proposal: Amend the *Act* to allow for the courts to consider victim impact statements during sentencing and for the courts to order a convicted person to publish the facts related to the offence at that person's expense.

Victim Impact Statements

The *Act* does not make provision for courts to consider victim impact statements, which provide valuable information in sentencing for criminal and regulatory offence prosecutions.

According to Helps, the ability for a victim to have their say on how the incident affects them has deep meaning for victims. A victim impact statement stands as a strong testament to the human costs of OHS infractions.

No other jurisdiction makes provision for victim impact statements in OHS legislation.

The cost implications for this change would not be significant.

Court Orders for Publication

Sections 217 to 219 of the *Act* provide penalty and sentencing provisions for a person convicted of an offence.

On conviction, a person may be fined, imprisoned, or both. The *Act* also provides the court with the power to make additional orders if a person is convicted of an offence.

The *Act* already gives courts the power to make an order directing the facts relating to the offence be **published by WorkSafeBC at the expense of the person convicted**.

It does not specifically make provision for courts to order **the offender to publish, at their own expense**, the facts relating to the commission of the offence, in any manner the court considers appropriate.

The cost implications for this change would not be significant.

Stakeholder Response:

Victim Impact Statements

There was general consensus among employer, labour and Indigenous representatives that it could be beneficial to allow courts to consider victim impact statements at sentencing, and to set that out specifically in the *Act*.

Employer representatives emphasize this proposal is intended only for prosecutions under the *Act*, not for administrative penalties. One representative also expressed caution that victim impact statements should not outweigh the hard facts of the case when courts determine penalty levels.

Court Orders for Publications

There was also consensus among employer, labour and Indigenous representatives, questioning the need for the proposed change for court ordered publication. However, they suggest if government determined such an amendment is required, they are not opposed to it.

Labour representatives note when WorkSafeBC publishes the facts related to an offence, care is taken to protect the anonymity of affected workers. They caution that additional measures would be required to protect the anonymity of the worker if the offender was ordered to publish the facts of the offence, especially if sensitive information involved. This is particularly important in cases involving whistle-blowers.

Observations and Recommendation:

Employer, labour and Indigenous representatives generally agree an amendment to the *Act* for courts to consider victim impact statements could be a beneficial change. However, upon consideration of current provisions in the *Act* on court orders for publication, the proposal appears to add little benefit.

Recommendation:

Victim Impact Statements: Amend the *Act* to allow for the courts to consider victim impact statements during sentencing.

Court Orders for Publication: No amendments to the *Act* are recommended.

4. Maximum Insurable Earnings

Proposal: Amend the *Act* to set the maximum insurable earnings at $100,000 per year, and delegate authority to the Board of Directors to adjust the maximum insurable earnings, from time to time, so that at least 90 percent of workers have coverage for all of their earnings.

The current maximum wage rate for 2020 is $87,100.00. An increasing proportion of earners are earning above the current maximum.

Bogyo notes an increasing proportion of earners are earning above the current maximum. He also notes this change would restore British Columbia to a level at or near most neighbouring and similar large jurisdictions.

There is no cap on maximum insurable earnings in Alberta and Manitoba. However, the Manitoba government recently introduced amendments that would, among other things, reinstate a cap on maximum insurable earnings.

In the rest of the Canadian jurisdictions, the cap ranges from $55,300 in Prince Edward Island to $95,400 in Ontario.

Before eliminating the cap on insurable earnings in 2018, Alberta set the cap so that at least 90 percent of workers had coverage for all of their earnings.

This change would cost approximately $20 million annually, and increase the average premium rate by about 2 cents per $100 of payroll.

The one-time effect on claim liabilities would be an increase of approximately $25 million.

Stakeholder Response:

There was consensus among employer, labour and Indigenous representatives to support this proposal.

Employer representatives are comfortable with the cap on insurable earnings being set at a level that it captures all of the earnings for 90 percent of workers in British Columbia. They note the cap in British Columbia should be comparable to other jurisdictions, and not "on the low side". However, they emphasize there must continue to be a cap on insurable earnings. Going forward, they believe the Board of Directors should retain authority to adjust the cap through policy.

Labour representatives are supportive of this proposal, but note it will benefit higher income workers, not low wage workers. They would prefer a legislative change to base benefits on 100 percent of net income, rather than the current requirement of 90 percent of net income.

Observations and Recommendation:

Labour employers and Indigenous representatives all supported this proposal.

Recommendation: Amend the *Act* to set the maximum insurable earnings at $100,000 per year, and delegate authority to the Board of Directors to adjust the maximum insurable earnings, from time to time, so that at least 90 percent of workers have coverage for all of their earnings.

5. Presumed Retirement Age

Proposal: Amend the *Act* to increase presumed age of retirement from age 65 to 70. The amendment would change all references in the *Act* from age 65 to 70 (and age 63 to 68).

The 2002 legislative change moved away from full life pensions to permanent disability compensation coverage ending at the presumed retirement age, 65. It also limited benefits to two years for those 63 years of age or older on the day of injury. The actual retirement year could be set at an age beyond age 65 if a later retirement date was supported by evidence.

Bogyo notes this change would not fundamentally change the intent of the 2002 amendments to replace pensions for life with compensation benefits ending at the presumed retirement age of 65. Rather, it recognizes the societal and demographic changes over the past two decades.

According to Bogyo, aging “baby boomers” account for a 50% increase in the population over the age of 65, but their employment rate has more than doubled over the same time.
Statistics Canada reports the average retirement age in Canada in 2019 was 64.3, a slight increase from 63.4 in 2015.

Over the same five year period, the average retirement age for public sector employees increased from 61.4 to 62.6.

Average private sector employee retirement edged up by a smaller amount, from 64.1 to 64.4.

Self-employed workers tend to retire later; their average retirement age increased from 66.7 to 67.1.

With the exception of Quebec, and Northwest Territories and Nunavut, all other Canadian jurisdictions set the presumed retirement age at 65. Quebec sets it at 68. Northwest Territories and Nunavut provide a pension for life.

This change would cost approximately $55 million annually, and increase the average premium rate by about 5 cents per $100 of payroll.

The one-time effect on claim liabilities would be an increase of approximately $750 million.

Stakeholder Response:

While Labour representatives acknowledge this would be an improvement, they would prefer a return to pensions for life. They also reiterate it is difficult to respond to this proposal without the opportunity to consider the Patterson Report.
Conceptually, employer representatives initially had some tolerance for an increase in the presumed retirement age, but not to age 70. They argue any change in the presumed retirement age should be tied to objective indicators, so as to accurately reflect changes in societal norms.

After taking into consideration Statistics Canada information on retirement, the presumed retirement age in workers’ compensation legislation in most other jurisdictions, as well as the presumed retirement age for government programs like Canada Pension Plan and Old Age Security, employer representatives believe the evidence supports maintaining the presumed retirement age at 65.

They also note that while some workers continue to work beyond age 65, other workers retire earlier. With that in mind, they suggest WorkSafeBC needs to be able to adjust retirement age up or down to reflect a worker’s actual situation.

Taking into account the evidence available, the Indigenous representative also did not support this proposal.

Observations and Recommendation:

The inability for WorkSafeBC to adjust the retirement age up or down to reflect a worker's actual situation contributes to a lack of precision in decision-making about a worker's retirement date. Workers' compensation legislation in most other jurisdictions set the presumed retirement date at 65; so too do public retirement programs like CPP and Old Age Security. At this point, the evidence does not support increasing the presumed retirement age.

Recommendation: No amendments to the *Act* are recommended.

6. Review determination of likely retirement date after other outstanding decisions are concluded:

Proposal: Provide authority for WorkSafeBC to make a preliminary determination on a worker's likely retirement age, with a review of that determination conducted two years after all the outstanding decisions relating to the permanent disability entitlement have been made.

Petrie recommends this be undertaken by WorkSafeBC through a change in policy. However, it has been determined a legislative amendment is necessary to enable such a reconsideration.

Once a worker is entitled to compensation, the *Act* requires WorkSafeBC to determine the amount and duration of compensation. Section 23.1 of the *Act* contemplates these compensation determinations will be made at the same time. Legislated time frames for reopening, reconsidering, reviewing and appealing a decision limit the ability of WorkSafeBC to re-determining the retirement age at a later date.

The *Act* establishes the "normal retirement age" for a worker as age 65, or, if the worker is 63 years of age or older at the time of injury, two years after the date of injury. If an injured worker is able to provide satisfactory evidence existing at the time of the injury that the worker would have retired later than the normal retirement age, compensation is payable until the date the worker would have retired as determined by WorkSafeBC.

Petrie notes at the time the determination is made on a worker's entitlement to, and duration of compensation, evidence of the likely retirement date, is at best thin. He also notes, because the duration of compensation is important to workers facing a lifetime of disability, there is a tendency to almost automatically appeal likely retirement date decisions, and attempt to gather additional evidence. Failure to do so within the 75 day time limit means the determination is final and binding.

Only workers' compensation legislation in British Columbia and Alberta allow for a worker's retirement date to be set at a date later than the normal retirement date.

However, unlike WorkSafeBC, WCB Alberta is not required to make the retirement age determination at the same time as the decision about entitlement to a disability award. WCB Alberta generally determines the retirement age of a worker as the worker approaches normal retirement age, and may also review the decision if the worker's circumstances change.
No jurisdiction appears to provide for a reconsideration of the worker's retirement date as contemplated in this proposal.

The cost of this potential change could not be reliably estimated.

Stakeholder Response:

There was consensus among employer, labour and Indigenous representatives that the proposed two year time frame for reviewing the likely retirement date was not workable.

Employer and labour representatives recognize the difficulties most workers have providing evidence, when their eligibility for compensation is being determined, that they would retire later than age 65. This is especially the case for younger workers.

Labour representatives argue, that given the 75 day time limit to review decisions, resources and time are wasted because many workers review and appeal the retirement age decision to "buy themselves more time" in the hopes of having new evidence they can bring before the WCAT.

They suggest an alternative approach: provide for a one-time "reconsideration" of a worker's retirement age at a point closer to a worker's retirement age. (This would be different from current reconsiderations, so would not require a significant medical change or recurrence).

Employer representatives are not convinced that the alternative suggested by labour representatives would reduce the number of appeals. They note a process to challenge the likely retirement age determination is already in place.

Observations and Recommendation:

Labour and employer representatives agree that the proposed two year time frame for reviewing the likely retirement date was not workable.

A review of a worker's likely retirement age as the worker approaches normal retirement age would lead to more accurate, and consequently more fair decisions about the retirement age for injured workers in receipt of permanent disability awards.

Recommendation: Amend the *Act* to provide authority to WorkSafeBC to make a final determination of the retirement age of an injured worker at a point when the worker is approaching normal retirement age.

7. Full Consumer Price Index ("CPI") Cost of Living Adjustments

Proposal:

- Amend the *Act* to make the annual cost of living adjustment equal to full CPI, going forward;
- Retain the current 0 percent floor and 4 percent cap on cost of living adjustments;
- Provide WorkSafeBC authority to apply a cost of living adjustment of up to 1 percentage point less than CPI if the funding level of WorkSafeBC is less than 100 percent; and
- Also provide WorkSafeBC authority to provide periodic adjustments to restore any deferred CPI increases when the funding level of WorkSafeBC is above the target capital adequacy level.

It's not clear from Bogyo's recommendations if the 4 percent cap on cost of living adjustments could be exceeded for periodic adjustments to restore deferred CPI increases.

In addition to restoring the value of cost of living adjustments going forward, Bogyo notes, this proposal would permit WorkSafeBC to take timely defensive action to protect the Accident Fund. It would also permit restoration of any deferred CPI increases when the funding level of WorkSafeBC was restored. It would be similar to defined pension plans that apply the full CPI when funding is available.

Only British Columbia, Nova Scotia and Prince Edward Island appear to discount CPI when calculating cost of living adjustments.

Full CPI is used, with some variations, for cost of living adjustments in Alberta, Saskatchewan, Ontario, Quebec, Newfoundland & Labrador, Yukon, and Northwest Territories and Nunavut.

Manitoba and New Brunswick make cost of living adjustments based on Industrial Aggregate Earnings.

The annual cost of this change would be approximately $45 million; it would increase the average premium rate by about 4 cents per $100 of payroll.

The one-time effect on claim liabilities would be an increase of approximately $700 million.

Stakeholder Response:

Labour representative support the application of full CPI cost of living adjustments. However, they have serious concerns about giving discretion to WorkSafeBC to apply a cost of living adjustment of less than full CPI when the funding level was inadequate. Alternatively, they propose that when CPI is 4 percent or less, the cost of living adjustment should be full CPI. Only when CPI exceeds 4 percent would WorkSafeBC have discretion to apply a cost of living adjustment of less than full CPI. The use of that discretion would need to be linked to a logical trigger point (such as a funding level of less than 100 percent) and the discretion would only apply to any increases above 4 percent.

The Indigenous representative is open minded to something better than CPI less 1 percent, but is looking for an option that would be more responsive to the financial situation of WorkSafeBC. He notes the change needs to be sustainable, and funds need to be available for the cost of living adjustments.

Employer representatives acknowledge that British Columbia is out of step with other major jurisdictions in the application of CPI for cost of living adjustments. Nevertheless, they do not support this proposal.

They reiterate their concerns about sustainability of the system as well increasing costs for employers, noting in particular the effect on small business. They also point out many workers do not receive annual wage increases, noting public sector workers and small business employees may have years with no wage increases at all.

Observations and Recommendation:

While there was no consensus on this proposal, it's notable that the discounted CPI WorkSafeBC applies to cost of living adjustments is out of step with most other Canadian jurisdictions.

Almost two decades after financial stability issues prompted the legislative change to discount CPI for cost of living adjustments, it is increasingly difficult to justify continuing the practice. The financial position of WorkSafeBC improved significantly, the average premium rate has fallen, and for a number of years, surplus has been allocated to subsidize employers' premiums.

It is true that not all British Columbia workers receive annual wage increases to account for the effect of inflation. However, if the policy objective was to have WorkSafeBC cost of living adjustments reflect annual wage changes in the labour market, it would be more appropriate to index benefits to the annual change in average or median wage in British Columbia.

Bogyo's proposal to give the Board of Directors authority to discount CPI when the funding level of WorkSafeBC is below 100 percent, with corollary authority to restore deferred CPI increases when funding is adequate would provide appropriate protection for the financial sustainability of the workers' compensation system.

Recommendation: Amend the *Act* to make the annual cost of living adjustment equal to full CPI, going forward. The amendment should also:

- retain the current 0 percent floor and 4 percent cap on cost of living adjustments;
- provide WorkSafeBC authority to apply a cost of living adjustment of up to 1 percentage point less than CPI if the funding level of WorkSafeBC is less than 100 percent (when full CPI is less than 5 percent);
- provide WorkSafeBC authority to provide periodic adjustments to restore any deferred CPI increases when the funding level of WorkSafeBC is above the target capital adequacy level; and
- provide WorkSafeBC authority also to exceed the 4 percent cap when periodic adjustments are required to restore deferred CPI.

8. One Time Adjustment to Existing Permanent Disability Awards and Survivor Pensions to Account for Full CPI since the Award was Established

Proposal: Amend the *Act* to give WorkSafeBC authority to make a one-time cost of living adjustment to existing permanent disability awards and survivor pensions going forward.

This would not be a one-time retroactive payment, rather it would be a cost of living adjustment for payments going forward to restore lost purchasing power for awards established since 2002. It would not be available to injured workers whose compensation terminated before the effective date of this proposed amendment.

Bogyo notes there are about 4,700 survivor pensions and more than 45,000 workers being paid monthly. With the exception of claims established in the current year, each would receive an additional cost of living adjustment to their pensions.

He points to one jurisdiction, Ontario that had made similar adjustments. Between 2007 and 2009, Ontario provided three additional cost of living adjustments of 2.5 percent, in order to restore some of the lost purchasing power for some pensions as a result of discounted cost of living adjustments in the past.

While there would be no effect on average premium rates and no annual cost implications, the one-time effect on claim liabilities of this change would be an increase of approximately $700 million.

Stakeholder Response:

Labour representatives are supportive of this proposal, noting it benefits many injured workers and survivors most affected by the discount applied to cost of living adjustments since 2002.

However, they recognize the significant cost associated with this proposal, and were concerned that allocating $700 million to this proposal from the $2.6 billion excess surplus would leave substantially less funding available for other important changes. They again reference the difficult position they were in without the ability to consider the Patterson Report.

In general terms, labour representatives think priority should be given to proposals that benefit the greatest number of injured workers and their families, and those hardest hit by compensation and benefit reductions introduced in 2002.

Employer representatives firmly oppose this proposal. While they acknowledge it would be an adjustment for payments going forward, it still has the appearance of retroactivity. From their perspective, it is unwise to apply changes to workers' compensation retroactively.

The Indigenous representative expresses similar concerns and does not support this proposal.

Observations and Recommendation:

On the face of it, it is compelling to contemplate restoring the lost spending power to injured workers and survivors currently receiving permanent disability awards. However the costs associated with making such an adjustment are considerable. In addition, questions of equity would be raised for those injured workers whose disability award payments ended before this proposed change to the *Act* took effect. Addressing those concerns would significantly add to the cost of this proposal.

Recommendation: No amendments to the *Act* are recommended.

9. Base Survivor and Dependant Benefits on Maximum Rather than Average Earnings.

Proposal: Amend the *Act* to determine survivor and dependant benefits for a fatality claim on the basis of the maximum earnings threshold in the *Act*, rather than the average earnings of the deceased worker.

The amendment would also apply to individuals who have purchased Personal Optional Protection and to other cases where a wage rate is required to set survivor or dependant benefits. It would have no effect on fatality claims where there are no qualified survivors or dependants.
Bogyo notes survivor and dependant beneficiaries of workers' compensation insurance lose more than the worker's income. They often lose the support that enables their own earning capacity, education and housing options.

British Columbia and six other Canadian jurisdictions use average earnings to determine survivor and dependant benefits for a fatality claim.
Alberta sets survivor and dependant benefits at the same level the worker would have received if the worker had lived and suffered a permanent total disability.

Quebec and Prince Edward Island set survivor and dependant benefits as a percentage of the deceased workers income replacement benefit.

Yukon and Northwest Territories and Nunavut use maximum wage rates to determine survivor and dependant benefits for a fatality claim.

The annual cost of this change would be approximately $25 million; the average premium rate would increase by about 2 cents per $100 of payroll.

The one-time effect on claim liabilities would be an increase of approximately $90 million.

Stakeholder Response:

Labour representatives are supportive of this proposal, noting it would improve benefits for widows and dependants. However, they worry about prioritizing this proposal ahead of a number of other critical issues affecting injured workers and survivors they think need to be addressed.

Employer representatives do not support this proposal. They point out most other jurisdictions base survivor and dependant benefits on the average earnings of the deceased worker. The proposal is also inconsistent, they note, with the workers compensation principle of wage loss replacement.

The employer representatives also note the current legislation confers an additional benefit to survivors; while injured workers receive compensation benefits until their retirement date, survivors generally receive pensions for life.

For the same reasons, the Indigenous representative does not support this proposal.

Observations and Recommendation:

It's noteworthy that only two Canadian workers' compensation boards, Yukon and Northwest Territory/Nunavut, use the maximum legislated wage rates to set survivor and dependant benefits for a fatality claim. Most use the worker's average earnings to set these benefit payments.

If the intent of these benefits is to compensate for lost earnings of the deceased worker, using the maximum wage threshold introduces inaccuracy into the calculation.
It is worth noting as well, that while WorkSafeBC payments to injured workers terminate on their retirement date; generally, survivors receive pensions for life.

Recommendation: No amendments to the *Act* are recommended.

10. Lump-sum Payment to Estate of Fatally Injured Worker

Proposal: Amend the *Act* to provide for a new lump-sum payable to the estate of a fatally injured worker.

- In addition to any other fatality benefits, this amendment would enable payment of 50 percent of the maximum yearly compensation benefit to the estate of a fatally injured worker.
- It would also require an amendment to allow the executor/executrix of the estate to make a claim.

Bogyo notes this change would ensure all work-related fatality cases are recognized with an equal amount of compensation. If there are no survivors or dependants, the executor/executrix could apply for, receive and distribute the benefit as part of the assets of the estate.

Alberta, Saskatchewan, Manitoba and New Brunswick provide for a lump sum payment to the worker's estate ranging from $12,890 in Manitoba for necessary expenses of a death, to $90,772 in Alberta as a lump sum fatality payment when it is not paid to the worker's dependants.

The annual cost of this change would be about $10 million, and the effect on the average premium rate would be an increase of about 1 cent per $100 of payroll.

The one-time effect on claim liabilities would be an increase of approximately $35 million.

Stakeholder Response:

Labour, employer and Indigenous representatives think proposals providing improved benefits to injured workers and their families should take priority over this proposal. They also say WorkSafeBC should examine the adequacy of the lump sum payment for funeral costs and consider increasing it, if the amount is found to be inadequate.

While labour representatives agree every life matters, they thought this potential change was not the best way to recognize that. They are concerned that, in some cases, the ultimate beneficiary of this payment may be creditors rather than family members of the deceased worker.

From their perspective, greater priority should be placed on amendments that make improvements for injured workers, survivors and dependents.

Employer representatives think this proposal makes little sense. Scarce dollars, they say, should be allocated to injured workers and their families rather than the estates of fatally injured workers.

Having heard the concerns from labour representatives and employer representatives, the Indigenous representative does not support this proposal.

Observations and Recommendation:

Employer, labour and Indigenous representatives indicate priority should be given to other proposals to improve benefits to injured workers and their families. Their suggestion to review WorkSafeBC lump sum payments for funeral and related costs, and make necessary adjustments to ensure they are adequate, merits active consideration.

Recommendation: No amendments to the *Act* are recommended.

11. Financial Security of Accident Fund

Proposal: Amend the *Act* to add new powers to improve the ability of WorkSafeBC to secure funds owed by delinquent and bankrupt employers by:

- making explicit provision for director's liability;
- strengthening provisions for levying unpaid assessments on successive employers; and
- adding authority for collection officers to issue a "requirement to pay".

Bogyo notes delinquent or abandoned accounts transfer costs from offending employers to other employers who keep their WorkSafeBC accounts current. These proposals would enable WorkSafeBC to recover the maximum possible amount owing and limit the externalization of costs to other employers.

He also notes all jurisdictions have similar challenges related to collections, notably from employers without assets, out of province employers, or employers who keep reincorporating to avoid paying existing liabilities.
WorkSafeBC advises there would be careful oversight on the use of these powers to ensure they are used appropriately and consistently.

These proposed changes can be expected to produce some savings for the workers' compensation system, but they would not be significant. Their effect on the average premium rate, and their one-time effect on claim liabilities cannot be reliably estimated.

Directors' Liability

While some sections of the *Act* provide authority similar to directors' liability, there are no explicit directors' liability provisions for such things as unpaid assessments (including administrative penalties under Part 3 of the *Act*) and for fines ordered for an offence under the *Act*.

There are five jurisdictions with explicit directors' liability provisions: Manitoba, Nova Scotia, Prince Edward Island, Newfoundland/Labrador and Quebec. According to Bogyo, those jurisdictions report that notifying an employer that directors will be held liable for the corporate debt often prompts immediate payment.

Quebec excludes from the application of directors' liability, those directors who, in the circumstances, exercised a reasonable degree of care, diligence and skill, or could not have been aware of the non-payment of assessment.

Successive Employers

Successive employer provisions in the *Act* do not adequately deal with delinquent accounts. They are generally applied to debts owing for the year in which the

succession took place and encompass only liability incurred within the year of succession.

Every Canadian jurisdiction except for Yukon has express legislative provisions to deal with successor firms. Without a mandatory clearance certificate, the purchaser of a business or inventory from that business in Saskatchewan or Prince Edward Island will be liable for the unpaid assessments of the vendor.

Requirement to Pay

Bogyo advises Alberta is the only jurisdiction with "requirement to pay" provisions (also known as a "demand to pay"). A "demand to pay" puts a hold on a firm's bank account for 30 to 60 days.

One collection avenue available now to WorkSafeBC for unpaid assessments from an employer is to apply for a garnishing order. Garnishing orders have limited effectiveness because of the specificity of the order – the amount, bank account and date are clearly set out in the order. Delinquent employers may move funds before the order takes effect.

A "requirement to pay" provision could allow for greater flexibility than a garnishing order and could also be applied to different types of payments a third party may make to an employer, such as future rent or lease payments, loan repayments, and accounts receivables.

Stakeholder Response:

Employer representatives question how large a problem this represented to the workers' compensation system, and stress the need for good oversight and control on the use of powers like this.

They argue that British Columbia already has provisions assigning liability to directors'. They also questioned why a director who had no knowledge or who plays no part in making or approving a decision to not pay assessments or to breach the *Act* in another way, should be held responsible for the wrong doing.

Labour representatives support this proposal, noting there may be a link between delinquency on paying assessments and delinquency on OHS requirements.

The Indigenous representative is generally supportive of this proposal.

Observations and Recommendation:

This proposal was generally acceptable to employer, labour and Indigenous representatives. However, employer representatives express reservations about the potential for misuse of the proposed new powers.

WorkSafeBC has advised if the changes were implemented, there would be careful oversight on the use of these powers to ensure they are used appropriately and consistently.

When drafting amendments for directors' liability, consideration should be given to section 323.3 of the Quebec Act that shields those directors who, in the circumstances, exercised a reasonable degree of care, diligence and skill, or could not have been aware of the non-payment of assessment.

Recommendation: Amend the *Act* to add new powers to improve the ability of WorkSafeBC to secure funds owed by delinquent and bankrupt employers by:

- making explicit provision for director's liability;
- strengthening provisions for levying unpaid assessments on successive employers; and
- adding authority for collection officers to issue a "requirement to pay."

Consideration should be given to include a directors' liability shield, similar to Quebec's section 323.3, for those directors who, in the circumstances, exercised a reasonable degree of care, diligence and skill, or could not have been aware of the non-payment of assessment.

12. Authority to Provide Preventative Health Measures Prior to Claim Acceptance

Proposal: Amend the *Act* to give WorkSafeBC authority to pay health care expenses before claim acceptance on a "without prejudice" basis in cases where timely treatment is likely to lessen or prevent more serious harm or disability.

The *Act* does not provide express authority for WorkSafeBC to pay health care benefits before claim acceptance.

Pursuant to sections 5 and 6 of the *Act*, compensation (including health care) is only paid to a worker when it is determined that a personal injury, occupational disease or death arises out of and in the course of employment.

There are instances where it may be appropriate for WorkSafeBC to cover reasonably necessary health care costs as a preventative measure before the determination is made on the claim. For example:

- post-exposure prophylaxis following occupational exposure to an infectious disease (such as anti-retroviral medication after potential exposure to HIV); or

- in the context of mental disorder claims, preventative measures may include counselling services following a worker's exposure to a traumatic event before the worker meets the diagnostic criteria and/or receives a formal diagnosis.

Bogyo notes providing treatment or paying for prophylactic treatment prior to a claim acceptance decision may prevent a case from becoming a serious claim. Certain occupational diseases following exposure to hazards such as HIV, tuberculosis, or SARS exposures, as well as psychological injuries (such as PTSD) may be aggravated by a delay in treatment.

Petrie also recommends approving medical treatment where the worker is at risk for a significant deterioration without timely medical attention.

Saskatchewan, Ontario and Yukon Territory do make some form of preventative health care available for either psychological injury or exposure to infectious diseases or agents.

The effect of any potential costs or savings from this proposal on average premium rates, or any one-time effect on claim liabilities could not be reliably estimated.

Stakeholder Response:

There was general consensus among employer, labour and Indigenous representatives on the value of timely preventative intervention.

Labour representatives are very supportive of this proposal, noting it could contribute toward a shorter duration and cost for these claims. They also stress that if WorkSafeBC covers preventative health care expenses, workers should not be required to repay those costs if their claim is later denied.

Employer representatives express some support for early intervention and preventative measures and understand the potential benefits to the injured worker and the workers compensation system itself. However, they are concerned about the potential for widespread application of preventative intervention, especially with respect to mental health claims, and the potential for "offloading" societal costs onto the workers compensation system. They emphasize the need to avert scope creep through strict controls on the use of authority to cover preventative health care costs.

The Indigenous representative supports early intervention and preventative measures, but emphasizes the need for triggering criteria to limit payment to situations where the evidence supports likely acceptance of a claim.

Observations and Recommendation:

Both Petrie and Bogyo recommend approving payment for medical treatment prior to claim acceptance where prompt treatment is required to prevent significant deterioration of the worker's health. Certain occupational diseases following exposure to such

hazards as HIV, tuberculosis, or SARS as well as psychological injuries (such as PTSD) may be aggravated by a delay in treatment.
There is also some level of consensus among employer, labour and Indigenous representatives on the value of timely preventative intervention by WorkSafeBC. However, employer representatives express concern about potential "offloading" of costs onto the workers' compensation which deserves consideration.

It is worth noting that protocols are common between Canadian workers' compensation boards and health authorities and/or private insurance companies on the appropriate allocation of health care costs. There would be merit in reviewing those protocols in British Columbia at regular intervals.

Recommendation: Amend the *Act* to give WorkSafeBC authority to pay health care expenses before claim acceptance on a "without prejudice" basis in cases where timely treatment is likely to lessen or prevent more serious harm or disability.

13. Mental Disorder Claims

Proposal: Amend the *Act* to clarify when the one-year time limit for filing an application for compensation commences for mental disorders claims, thereby addressing the barrier that now exists for such claims.

All compensation claims must comply with the one-year limitation period set out in section 55(2) of the *Act*. An application must be filed within one year after the date of injury, death or disablement from occupational disease.

Section 55(2) predates section 5.1 to the *Act,* concerning mental disorders, and did not contemplate the complexity often associated with mental disorder claims.

Unlike physical injuries, which generally occur contemporaneously with the incident, onset of symptoms of mental disorder are often delayed or gradual. The limitation period may expire before workers realize their condition is work-related and/or have a formal diagnosis from a psychologist or psychiatrist.

All jurisdictions have limitation periods for filing a compensation application, ranging from 3 months in Newfoundland and Labrador to 2 years in Alberta.
It was not possible to provide a reliable estimate of the cost effects of this proposal.

Stakeholder Response:

There was consensus among employer, labour and Indigenous representatives that a solution is required for this problem.

Labour representatives understand the need for a solution to this problem, but noting the complexity of the issue, they have difficulty suggesting the best mechanism to address it.

They advise the one-year limitation period should not commence on the date of the traumatic event or significant stressor, as is currently the case. Doing so, means the limitation period often expires because the actual onset of a mental disorder can be delayed and difficult to identify and diagnose. They also point out using date of diagnosis is difficult because it would mean the start of the limitation period would be subject to the worker being diagnosed by a psychologist or psychiatrist as required by the *Act:* these mental health professionals can be difficult to access.

They again note the difficulty in addressing this issue without considering the Patterson Report. From their perspective, changes are also required to s. 5.1 of the *Act* to address additional barriers for mental disorder claims.

Employer representatives appreciate a solution is required to address the barriers to mental disorder claims. Rather than commencing the limitation period on the date of the traumatic event or significant stressor, they submit the one-year time limit should commence on the date of diagnosis or date of disablement, whichever is sooner.

Observations and Recommendation:

It is apparent to employer, labour and Indigenous representatives that the requirements in section 55 (2) to file an application for compensation within one year after the date of injury, death or disablement from occupational disease does not adequately address the realities of mental disorder claims. It's notable that there is no reference at all in section 55 (2) to mental disorder.

While there is consensus that a solution needs to be found for this problem, there is no consensus on what that solution should be. Given the complexities associated with mental health issues and mental disorder claims, caution should be exercised when attempting to legislate specific requirements for the commencement of the time limit for these claims. Making appropriate reference to mental disorder in section 55 may be sufficient to allow WorkSafeBC to develop more appropriate policies to address this barrier to mental disorder claims.

Recommendation: Amend the *Act* to provide WorkSafeBC authority to develop policy clarifying when the one-year time limit for filing an application for compensation commences for mental disorders claims.

14. Permanent Partial Disability Awards

Proposal: Amend the *Act* to reduce the threshold for determining when the loss of earnings ("LOE") method should be used instead of the loss of function ("LOF") method for calculating a worker's permanent partial disability award.

Petrie recommends reducing the threshold to use the LOE method for calculating a worker's permanent partial disability award in order to provide a more worker-centered recognition of the significant effect of the permanent disability on a worker's future earnings. He proposes setting the threshold at 10 percent.

When a worker has a permanent impairment as a result of a work-related injury, occupational disease or mental disorder, WorkSafeBC determines the worker's entitlement to a permanent disability award under section 23 of the *Act.* Section 23 sets out two methods of assessment:

- Section 23(1) sets out the LOF method and requires WorkSafeBC to estimate the worker's impairment of earning capacity from the nature and degree of the injury ("LOF Award"). The disability award is calculated by multiplying the worker's permanent disability rating by 90 percent of the worker's average net earnings.

- Section 23(3), sets out the LOE method. Under this method, the disability award is based on the worker's actual projected loss of earnings, calculated by comparing the worker's pre and post-injury earnings ("LOE Award").

Since the amendments of 2002, the *Act* requires the LOF method to be used exclusively, unless WorkSafeBC determines 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 the LOF Award does not appropriately compensate the worker for the injury. This is often referred to as the "so exceptional test".

Prior to 2002, disability awards were calculated using both the LOF and LOE methods and the worker's disability award was based on whichever method provided greater compensation. This is often referred to as the "dual method" of assessment.

The LOF method is an indirect method for calculating compensation for loss of earnings to an injured worker, and may not estimate as accurately the loss of a worker's future earning capacity. The LOE method, on the other hand, calculates loss of earning compensation more directly by comparing pre-injury earnings with post-injury earnings.

A WorkSafeBC practice directive stipulates a "significant loss of earnings" exists where there is a difference of at least 25 percent between the worker's pre-injury earnings and the combined total of the post-injury earnings and the amount of the LOF Award. A "significant loss of earnings" does not exist when the difference is 5 percent or less. However, WorkSafeBC staff have discretion to take into account the individual circumstances of each case to determine if a significant loss of earnings exists.

In practice, the threshold has declined over time. An increasing number of LOE Awards already are being issued for claims where the difference is less than 10 percent; and in some instances, LOE Awards are issued when the difference is less than 5 percent.

Issues surrounding the calculation of permanent disability awards are a significant source of dispute for WorkSafeBC. An injured worker's entitlement to an LOE Award is often appealed to Review and WCAT. Additionally, injured workers often also appeal the amount of their LOF Award, asserting the permanent disability rating is too low. To preserve their right of appeal, these appeals must be made within 75 days of the disability award decision.

The total number of LOE Awards is now similar to levels prior to the 2002 amendments. But the average cost for those LOE Awards is 40 percent lower. In 2018, the average cost for a LOE Award was $119,000, compared to $198,000 in 2002. This reduction in LOE awards costs can be attributed to the effect of other 2002 legislative changes:

- replacing lifetime pensions for injured workers with compensation ending at age 65 or actual retirement,
- calculating benefits based on 90 percent of net earnings rather than 75 percent of gross earnings, and
- annual cost of living adjustments based on a discounted CPI rather than full CPI adjustments semi-annually.

All the other Canadian jurisdictions (with exception of Northwest Territories/Nunavut) use a method similar to the LOE method exclusively to calculate a worker's disability award. As a result, injured workers receive disability awards based on their actual economic loss, but only if they are disabled from earning full pre-injury wages. Disability awards are then reviewed periodically and adjusted to reflect the worker's loss of earnings.

Like British Columbia, those jurisdictions also use an impairment rating system, but they are used for an entirely different purpose - to calculate a one-time lump sum non-economic payment (akin to a pain and suffering award in civil cases.)

Given that the number of LOE Awards is now similar to pre-2002 levels, and that the costs of those awards have dropped by almost 40 percent, the cost implications of this proposal are less than many would think.

- If the threshold is set at 5 percent, the annual cost would be approximately $2.5 million; the average premium rate would increase by about 2/10 of a cent per $100 payroll; and the one-time increase in liabilities would be approximately $7.6 million.

- If the threshold is effectively set at zero, the annual cost is estimated to be no more than $4.5 million; the increase to the average premium rate would be about 4/10 of a cent per $100 payroll; and the one-time increase in liabilities would be approximately $15 million.

Stakeholder Response:

Noting there has been a good deal of dispute about the application of the "so exceptional test", labour representatives submit the simplest solution is to return to the dual method of assessment.

Given the low cost of setting the threshold at zero, about 4/10 of cent per $100 of assessable payroll, they submit this should be a priority amendment for government. They also characterize the system for determining permanent partial disability awards as "a decisional nightmare". With that in mind, they say setting the threshold for the "so exceptional test" at something like 10 percent or 5 percent would do little to simplify decision making or reduce dispute.

The Indigenous representative also supports setting the threshold at zero, noting it would more accurately reflect injured workers' loss of earnings.

Employer representatives challenge the inclusion of this proposal in the scope of these consultations. They note Petrie recommends policy changes to reduce the threshold for the "so exceptional" test, not legislative amendments. The 25 percent threshold is set out in a practice directive; WorkSafeBC can make this change through policy.

In their minds, the dual method system contributed to the financial sustainability issues giving rise to the 2002 amendments. They were concerned about the costs involved with returning to the dual method of assessment. They requested, and were provided more detailed cost information and statistics relating to permanent partial disability awards.

Observations and Recommendation:

Issues surrounding the calculation of permanent partial disability awards are a significant source of dispute for WorkSafeBC. Labour representatives characterize WorkSafeBC's determination of permanent partial disability awards as "a decisional nightmare".

It's worth emphasizing that the intent of these awards is primarily to compensate injured workers for their projected loss of earnings.

A major contributing factor to the source of dispute is the requirement in the *Act* that the LOF method to be used exclusively to calculate permanent partial disability awards, unless 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 the LOF Award does not appropriately compensate the worker for the injury.

The LOF method is an indirect and often a less accurate method for calculating compensation for projected loss of earnings to an injured worker. The LOE method, on the other hand, calculates the loss more directly by comparing pre-injury earnings with post-injury earnings.

This is an instance where British Columbia is out of step with most other Canadian jurisdictions. All the other Canadian jurisdictions (with exception of Northwest Territories/ Nunavut) use an LOE method exclusively to calculate a worker's disability award. Workers receive disability awards based on their actual economic loss, but only if they are disabled from earning full pre-injury wages. Disability awards are then reviewed periodically and adjusted to reflect the worker's loss of earnings. When those jurisdictions do use an impairment rating system similar to WorkSafeBC's, it is used to calculate a one-time lump sum non-economic payment (akin to a pain and suffering award in civil cases.)

While a recommendation to adopt the approach used in most other Canadian jurisdictions would be out of scope for this report, in the future consideration should be given to calculating permanent partial disability awards on the basis of a worker's actual economic loss. Such an approach would go some way to address concerns about both under-compensation and over-compensation. At that time, consideration could also be given to whether the *Act* should be amended to provide WorkSafeBC the authority to provide workers with lump sum non-economic loss payments for their permanent impairments.

While Petrie recommends the threshold for using the LOE method should be reduced from 25 percent to 10 percent, an increasing number of LOE Awards are already being issued for claims where the difference is less than 10 percent. Some LOE Awards are issued when the difference is less than 5 percent. The number of LOE Awards are now similar to pre-2002 levels, and that the costs of those awards have dropped by almost 40 percent.

If the threshold is effectively set at zero, the annual cost is estimated to be no more than $4.5 million; the increase to the average premium rate would be only about 4/10 of a cent per $100 payroll.

Recommendation: Amend the *Act* to eliminate the threshold for determining when the LOE method should be used instead of the LOF method for calculating a worker's permanent partial disability award, and require WorkSafeBC to calculate a worker's permanent partial disability award using both the LOE and LOF method. The disability award payable would be based on whichever method provides the greater amount of compensation**.**

Concluding Observations:

Almost two decades have passed since the workers compensation system and legislation was subject to a comprehensive review. Given the narrow scope of these consultations and this report, there remain issues of concern to both employer and labour partners of the workers' compensation system. This was of particular concern to the labour representatives.

Workers' Compensation in the three Prairie Provinces require a periodic review of the system and legislation. That merits consideration in British Columbia. In addition, given the relationship of labour and employers to the system, dating back to Meredith and the historic compromise, it would be advisable for future reviews of the system and legislation to be undertaken by a tripartite panel with equal representation from employers and labour, and an independent chair. The panel should consult stakeholders, and Indigenous representatives.

Concerns raised by employer representatives about the effect of recommended legislative changes on costs to employers and the British Columbia business climate cannot be ignored. Consideration should be given not only to the effect on employer premiums, but also how the British Columbia average premium rate compares with other Canadian jurisdictions.

The main driver for premium rates is compensation costs. According to the Association of Workers' Compensation Boards of Canada (AWCBC), the portion of the average premium rate required to cover compensation costs in British Columbia declined from $1.17 per $100 of payroll in 2018 to $1.16 in 2019. British Columbia was one of only 4 jurisdictions to experience a reduction. Average compensation costs ranged from a high of $1.68 per $100 payroll in Nova Scotia to a low of $0.78 in Saskatchewan.

The average British Columbia premium rate in 2019 remained steady at $1.55 per $100 of payroll. Embedded in that rate is a subsidy of 18 cents per $100 of payroll. Three other Canadian jurisdictions held their average rate steady. Average rates increased in 4 jurisdictions, and declined in 4 jurisdictions.

2019 average rates ranged from a high of $2.65 in both Nova Scotia and New Brunswick to a low of $0.95 in Manitoba. At $1.55, the rate in British Columbia is lower than 8 other Canadian jurisdictions. When compared to the three Prairie Provinces, Ontario and Quebec, the average rate in British Columbia is lower than Ontario and Quebec, but higher than the Prairie Provinces.

If all of the recommendations in this report are adopted, and no action is taken to offset the effect on premiums, the average rate would increase 6.6 cents per $100 payroll. British Columbia's average premium rate would increase to a little less than $1.62 per $100 payroll, below the rate in 7 other Canadian jurisdictions. About $740 million would also be drawn down from the $2.6 billion excess surplus.

There would be some additional costs due to the interactive effect of the increased cap on maximum insurable earnings and full CPI cost of living adjustments; in addition, the costs for some proposals could not be reliably estimated. WorkSafeBC would also incur implementation and operational costs.

To facilitate improved compensation and benefit for workers, and address the effect on employer costs and the business climate, serious consideration should be given, at this time, to continue allocating excess surplus to subsidize premiums and to smooth the rate increase over time.

In general terms, consideration should also be given to allocating excess surplus, now and in the future, in a manner that benefits workers as much as it benefits employers, while supporting a sustainable workers compensation system. It would be beneficial to consult labour and employers when determining how that should be done.

Appendix A

List of Stakeholder Participants

Name	Title	Organization Representing
Doug Alley	Managing Director (ex-officio)	Employers Forum
Dave Baspaly	President/CEO	Council of Construction Associations
John Beckett	Vice President – Training, Safety, & Recruitment	BC Maritime Employers' Association
Lynn Bueckert	OHS Advisor	Hospital Employees Union
Sam Chauhan	Manager, Occupational Health & Safety	City of Surrey
Laird Cronk	President	BC Federation of Labour
Dave Earle	President and CEO	BC Trucking Association
Ed Kent	OHS Representative	United Steel Workers
Kevin Love	Lawyer	Community Legal Assistance Society
Iain MacDonald	Worker Advocate	BC Government Services Employees Union
Tim McEwan	Vice President	Independent Contractors Association of BC
Rick Milone	Vice President of Human Resources	First Nations Health Authority
Sheila Moir	Director of Occupational Health and Safety	BC Federation of Labour
Ken Peacock	Chief Economist	Business Council of BC
Gregory Rabin	Lawyer	BC Nurses Union
Sari Sairanen	Director – Health, Safety and Environment	Unifor
Moninder Singh	Director – Occupational Health & Safety	BC Nurses Union
Alan D. Winter	Legal Adviser (ex-officio)	Employers' Forum