

CHAPTER SEVEN: WORKERS' COMPENSATION

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CHAPTER SEVEN: WORKERS' COMPENSATION

I. INTRODUCTION

A. Scope of This Section

This chapter covers basic legislation and procedures. If a student has a client with a more complicated issue, the student should refer to the references and advisory officers listed in the resources section at the end of the chapter. Readers should be careful to consult the latest version of the Board's policy manual, which can be found at the policy section of WCB's web site at www.worksafebc.com.

B. Governing Legislation, Regulations, and Referrals

1. Rehabilitation Services and Claims Manual

A great place to start your research is the *Rehabilitation Services and Claims Manual* (Volume II) [RSCM]. The RSCM is binding on both the WCB and WCAT and provides a detailed discussion of the policy that must be considered before a decision is made. Volume I of the RSCM applies to claims before June 30, 2002, subject to some exceptions. Therefore, research should almost always begin with Volume II:

http://www.worksafebc.com/publications/policy_manuals/Rehabilitation_Services_and_Claims_Manual/default.asp

2. Legislation

Workers' Compensation Act, RSBC 1996, c 492 [WCA].

Workers' Compensation Amendment Act 2011, SBC 2012, c 23 (introduced as Bill 14, effective July 1, 2012)

- Bill 14 amends s 5.1 of the *W*. Most significantly, it expands compensation for mental disorders. A worker is now entitled to compensation for a mental disorder arising from traumatic events over the course of their employment or predominantly caused by a significant work-related stressor (including bullying or harassment). See "Psychological Damages".

Workers' Compensation Amendment Act, SBC 2002, c 56 (introduced May 13, 2002, as Bill 49 and Bill 63) [WCAA].

- Bill 49 substantially reduces benefits for injuries occurring on or after June 30, 2002. Changes include a reduction of the basic benefit rate, partial deduction of CPP disability benefits, greatly reduced benefits after age 65, and less flexible rules for assessing wage rates and partial disabilities.

Workers injured before June 30, 2002 and whose condition has deteriorated will receive additional benefits under the old (and more generous) rules rather than the new rules.

- Bill 63 changes the entire Worker's Compensation appeal system. These changes are discussed in more detail below under **Section II.K: Claims Procedure**. In addition, this bill binds the policies of the Board of Directors on the Board and the appeal tribunals, effectively allowing the policies to be a form of subordinate legislation. These changes were implemented on March 3, 2003.

Bill 37, *Skills Development and Labour Statutes Amendment Act*, 4th Sess, 37th Parl, British Columbia, 2003 (introduced October 8, 2003, as Bill 37).

- Bill 37 substitutes a new set of rules for compensating survivors and allows "lay advocates" to represent workers or employers in appeal tribunals. There are no requirements as to the training, insurance, supervision or certification of these advocates.

Administrative Tribunals Act, SBC 2004, c 45 [ATA]

- Makes significant changes to the powers of the Workers' Compensation Appeal Tribunal. These include elimination of any ability to deal with constitutional or Charter issues, an arguably tougher standard for judicial reviews, and a 60-day time limit to file a judicial review of a WCAT decision.
- Under s 46.3(1) of the ATA, the Workers' Compensation Appeal Tribunal has no jurisdiction to apply the *Human Rights Code*, RSBC 1996, c 210.

3. Print Resources

Heather MacDonald and Marguerite Mousseau. *Workers' Compensation in British Columbia*, (LexisNexis Canada, 2009)

- A comprehensive overview of the workers' compensation system in British Columbia, written by two members of the WCAT, the senior appeal tribunal.

4. Referrals

Unions

- Unions provide more representation for injured workers than all other sources combined. If a worker was engaged in employment under a collective agreement when injured, his or her union or former union

should be the first resource. Some unions will even help former members with claims arising out of injuries suffered in non-union employment.

Workers' Advisors Offices (WAO)

Website: www.labour.gov.bc.ca/wab

Lower Mainland Regional Offices:

500-8100 Granville Avenue
Richmond, BC V6Y 3T6

Telephone: (604) 713-0360
Toll-free within BC: 1-800-663-4261
Fax: (604) 713-0311

204 - 32555 Simon Avenue
Abbotsford, BC V2T 4Y2

Telephone: (604) 870-5488
Toll-free: 1-888-295-7781
Fax: (604) 870-5494

- This is the primary resource for non-union workers having difficulties with the Board. The advisors have direct access to the claim file and provide workers with detailed, confidential advice about the claim. They also offer very readable written information for claimants.
- The WAO only takes referrals by internet. Claimants must fill out the online inquiry form at the following website: <https://www.labour.gov.bc.ca/wab/inquiry/>. They will be contacted within 2 business days to set up a telephone appointment with an Intake Administrator.

Employers' Advisors Office

Telephone: (604) 713-0303

Toll-free within BC and Alberta: 1-800-925-2233

Fax: (604) 713-0345

Website: www.labour.gov.bc.ca/eao

Community Legal Assistance Society (CLAS)

300 – 1140 West Pender Street
Vancouver, BC V6E 4G1

Telephone: (604) 685-3425
Fax: (604) 685-7611
Toll-free: 1-888-685-6222

- CLAS may be able to help if a client has lost their appeal to the Worker's Compensation Appeal Tribunal (WCAT) and wants the WCAT to reconsider their decision, or a court to overturn the decision; and if the advocate who helped the client at WCAT cannot assist anymore.

WCB Main Inspection Office

6951 Westminster Highway
Richmond, BC V7C 1C6

Telephone: (604) 273-2266
Toll-free (outside Vancouver): 1-800-661-2112

- Complaints about violations of health and safety regulations should be directed here.

WCB Fair Practices Office

Street Address: 6951 Westminster Highway, Richmond, BC V7C 1C6

Telephone: (604) 276-3053

Fax (604) 276-3103

Mailing Address:

P.O. Box 5350 Stn. Terminal

Vancouver, BC V6B 5L5

- This office can be contacted when all internal remedies have been unsuccessful or if the worker has a complaint about matters that are not subject to appeal, such as rude conduct by WCB staff, failure to answer letters, or unfair procedures.
- Most lawyers who do WCB applications or WCAT appeals require payment in advance. For more information please see the lawyer referral section.

5. Internet Resources

WorkSafe BC

Website: www.worksafebc.com

- The Board's own site contains a wealth of material, including the complete Claims Manual, Appeal Division decisions (since January 1, 2000), the complete Reporter series of decisions, and most of the reports and documents listed above. It also has decisions of the old Appeal Division and the Review Division, and statistics and resources.
- A policy and legislation page is located at www.worksafebc.com/law_and_policy with links to an online version of the Act, recent amendments, and various policy and practice materials. This is the most practical way to research current policies and practices, including the Board's two-volume compensation policy manual, which has the force of law.

Workers' Advisor's Office

Website: www.labour.gov.bc.ca/wab/

- This site, which is part of the Ministry of Labour, contains excellent plain language summaries of the key aspects of the system written for the average claimant, and other material as well. This service is free for anyone who is not represented by a union.

Workers' Compensation Appeal Tribunal

Website: www.wcat.bc.ca

- This site provides information about WCAT and various aspects of Workers' Compensation appeal matters. The "How to Appeal" section

provides information on how to appeal, enables access to various appeal forms and provides internet links to WCAT publications as well as other resources that can assist in the appeal process. It also contains WCAT decisions, as well as forms required for appeal.

6. Organizations

Workers' Compensation Advocacy Group

300 - 1140 West Pender Street
Vancouver, BC V6E 4G1

Telephone: (604) 685-3425
Fax: (604) 685-7611

- An informal organization open to all advocates for injured workers, including union representatives, private and legal aid lawyers, workers' advisers, injured workers' group leaders, and others. The group meets monthly, and as a recognized stakeholder for injured workers, is regularly consulted by WCB and government about WCB matters.

PovNet's wcb-bc Email List

For more information, contact Jim Sayre at jsayre@clasbc.net, or Penny Goldsmith at penny@povnet.org.

- PovNet sponsors an interactive, confidential email list for workers' advocates. The list enables members to post questions and information about WCB cases and matters, and to respond to other members' postings.

BC Federation of Labour

200-5118 Joyce Street
Vancouver, BC V5R 4H1
Website: www.bcfed.com

Telephone: (604) 430-1420
Fax: (604) 430-5917

- The BC Federation of Labour represents more than half a million workers through affiliated unions in more than 800 locals, working in every aspect of the BC economy.

Canadian Injured Workers Society

Website: www.ciws.ca

- The Society was formed in 2005 by a group of injured Canadian employees and their family members that was interested in improving the workers compensation system in Canada. The Society is a non-profit corporation registered with Corporations Canada. The website is no longer updated however the archived resources may be useful.

II. WORKERS' COMPENSATION

A. Introduction

The *Workers' Compensation Act* [WCA] is a provincial statutory social insurance plan under which personal injury, illness, or death to a worker arising out of, and in the course of, his or her employment leads to no-fault compensation rather than court-awarded damages. Where a worker who is covered by the WCA suffers an injury or disease that arises out of the course of his or her employment, that worker loses the right to take legal action against any employer or worker covered by Workers' Compensation – including his or her own employer (See **Section II.L.2: Election**, for information on the right of an injured employee to take legal action). Coverage is generally compulsory. The workers compensation system is financed by assessments on employers. In BC, the Workers Compensation Board is also responsible for health and safety regulations, investigations and enforcement.

B. Compensation Synopsis

Compensation is generally payable where:

- a) the worker is covered under the Act;
- b) the worker has suffered an injury or disease or has died as a result of his work activities; and
- c) an application has been submitted to the Board in accordance with the required time limits and procedures.

The entitlement officers determine whether or not a worker is compensable under the scheme, with possible appeals proceeding to the Review Division and Workers' Compensation Appeal Tribunal.

C. Assessments of Employers

The theory behind the workers' compensation system is that the risk of loss through occupational disease or injury resulting from the workplace should be borne by industry as a cost of doing business. The WCA is administered by the Workers' Compensation Board (WCB), which is an independent administrative agency created by the provincial government. The program is funded by compulsory assessments on employers, which make up the Accident Fund. These assessments must be paid by the employer and cannot be deducted from the employee's pay (s 14). The Board gets preferential treatment in its power to collect from an employer. An employee whose employer is subject to the WCA is covered by the WCA regardless of whether or not the employer pays premiums.

Industries are divided into classes and sub-classes. The total assessments for each class is fixed according to the principles of collective liability; the Board is to collect sufficient money to cover the past and estimated future costs of all the claims from workers in each sub-class. Each employer then pays its share, based on the size of its payroll and adjusted for the number of claims against the employer under the Board's "experience rating" scheme. One negative effect of the experience rating system is that employers obviously have an economic interest in contesting their employees' claims. This makes the system more adversarial, which might be seen to contradict the principles of Workers' Compensation.

Some self-employed contractors are considered employers under the Act and therefore are assessed as such. These self-employed workers can purchase "personal optional protection" (POP) to cover their own risk of injury, in addition to the assessments they are required to pay to cover their risk as employers. This arrangement is common in the logging, transportation and construction industries.

D. Who Is Covered

1. Workers

The WCA was amended on January 1, 1994 to expand the range of workers covered. **All workers are now covered, unless specifically exempted.** Even certain volunteers are covered, as are students engaged in work study programs that are approved by the Board. Before this amendment, most office workers and other white-collar employees were not covered. Since the amendment, only a few exceptions have been recognized, such as professional athletes who have accepted a high level of risk, casual baby sitters, and non-residents. Requests for exemptions may come from workers, employers, or may be initiated by the Board. Decisions regarding exemption status may be appealed.

One of the unintended consequences of this universal coverage is to further limit the injured worker's right to sue for damages, since it is most likely that the person responsible for the injuries will also be an employer or worker covered by the system. An extreme example of this was found in a malpractice case, *Kovach v Singh (Kovach v WCB)*, [2000] SCJ No 3 [*Kovach*], where the Supreme Court of Canada found that the decision of the Board was not unreasonable. In this case, and in a similar Saskatchewan appeal, the Workers' Compensation Boards held that doctors treating an injured worker could not be sued for malpractice under the tort system because the injured worker was in the "course of employment" while undergoing treatment. The Board of Directors has responded strongly to cases that stray from this position. They will not allow any recourse to the tort system and have reaffirmed this bar to lawsuits in the policy directives.

2. **Workers in Federally Regulated Industries**

While working in BC, workers in federally regulated industries are directly subject to the workers' compensation system.

3. **Federal Government Employees**

Federal government employees are governed by the *Government Employees Compensation Act*, RS 1985, c G-5 which provides that injured federal government workers in a given province are to have their claims addressed by the provincial administrative body in that province, and are entitled to be compensated at a rate determined under the provincial workers' compensation scheme of the province in which they are employed (but paid out of a federal fund).

4. **Workers Who Suffer an Injury While Working Outside BC**

Workers who suffer an injury while working outside BC may be covered if:

- a) they work in a compensable industry;
- b) BC is their residence and usual place of employment;
- c) the extra-provincial work lasts less than six months;
- d) the work is a continuation of their BC employment; and
- e) they are working for a BC employer (WCA s 8(1)).

5. **Workers Under the Age of Majority**

Section 12 of the *Workers' Compensation Act*, RSBC 1996, c 492 states that a worker under the age of 19 is sui juris for the purpose of Part 1 of the Act, which means that workers who are minors are under no legal disability and are considered, for purposes of the Act, capable of managing their own affairs as if they were adults.

6. **Employers**

Employers covered by the WCA must contribute to the Accident Fund based on compulsory assessments. Some categories of self-employed people may voluntarily register with the Board and pay premiums for their own work activities. The assessment rate is based on a complex system of classification relating to type of business and previous accident rates. **Employers should be referred to the Employers' Advisors Office** (see **Section I.B.3: Referrals**, at the beginning of the chapter, for contact information).

E. The Board's Compensation Jurisdiction

Sections 96 and 113 of the WCA give the Board exclusive jurisdiction over workers' compensation matters. The courts have generally respected this strong privative clause. Section 96 specifically grants the Board the exclusive jurisdiction to inquire into, hear, and determine:

- a) whether an injury has arisen out of or in the course of an employment;
- b) the existence and degree of disability by reason of an injury;
- c) the permanence of disability by reason of an injury;
- d) the degree of reduction of earning capacity by reason of an injury;
- e) the average earnings of a worker, for the purpose of levying assessments, and the average earnings of a worker for purposes of payment of compensation;
- f) the existence of the relationship of a member of the family of a worker as defined by the Act;
- g) the existence of dependency;
- h) whether an industry is within the scope of the Act, and the class to which an industry should be assigned for the purposes of the Act;
- i) whether a worker is in an industry within the scope of the Act and entitled to compensation under it; and
- j) whether a person is a worker, a subcontractor, a contractor or an employer within the meaning of the Act.

Section 113 of the WCA gives the Board jurisdiction over compensation in relation to workplace health and safety.

F. Governance

Since 2002, the WCB has been governed by a Board of Directors which is composed of seven Directors, appointed by the government to oversee the Board and its policies. One Director is selected from a list provided by the BC Federation of Labour. Another Director represents employers, while the remaining Directors are chosen based on professional or "public interest" backgrounds. Under Bill 63, a policy of the Board was given a binding effect (WCA, ss 99 and 250). Thus, the Directors who create those policies are crucial to the fairness of the system.

G. Health and Safety Regulations

The Workers' Compensation Board (WCB) is also responsible for enacting and enforcing health and safety regulations under Part Three of the Act. The *Industrial Health and Safety Regulations* have been replaced with the WCB's *Occupational Health and Safety Regulation*, BC Reg 296/97. These regulations can be found online at www2.worksafebc.com/publications/OHSRegulation/home.asp. Workers or employers interested in the regulations can be referred to the Board's Health and Safety Department. The date of enactment should always be checked to determine which version was in effect at the time of injury.

H. A Worker May Refuse Unsafe Work

Under the existing *Occupational Health and Safety Regulation*, Part 3, a worker may refuse work that is unsafe. The worker must not carry out any work process if they have reasonable cause to believe that it would create an undue hazard to the health and safety of any person.

The right to refuse continues until the employer has taken remedial action to the satisfaction of the worker, or an officer has investigated the matter and advised the worker to return to work.

A worker who has exercised his or her right to refuse unsafe work must immediately report the refusal and the reasons for it to his or her supervisor or to the employer. The worker must remain available at the workplace during normal working hours until the investigation is complete. The employer may give the worker different duties to perform until the matter is resolved, and it may assign another worker to the job in question if the risk is specific to the worker (such as a person with a bad back being told to lift heavy boxes, or an untrained person being told to operate equipment).

I. Prohibition Against Discriminatory Action

Section 151 of the WCA states that an employer or union must not take or threaten any retaliatory action against a worker for exercising any of his or her rights under Part Three of the Act. A non-exhaustive list of such discriminatory actions is provided in s 150. This list includes: suspension, lay-off, or dismissal; demotion; reduction in wages or transfer of duties or of location; coercion or intimidation; or the imposition of any discipline, reprimand, or penalty.

Complaints should be made in writing to the board within the time limits set out in s 152. Section 152(2) places the burden of proving the alleged discriminatory action did not occur on the employer or union as applicable. The Board has been given a wide range of remedies under s 153. It is important to note that this section is **not** for human rights complaints, but only for retaliation against a worker for exercising the rights provided by the WCB system.

J. Conditions That May Be Compensated

1. Causation Requirements

The key question that must be determined before a claim can be accepted is whether the injury, death, or disease occurred as a result of employment. Sections 5, 6, and 8 of the Act address causation in general terms. The determination of whether an injury arose out of and in the course of employment can be made with reference to factors such as:

- whether the injury occurred on the premises of the employer;
- whether it occurred in the process of doing something for the benefit of the employer;
- whether it occurred in the course of action taken in response to instructions from the employer;
- whether it occurred in the course of using equipment or materials supplied by the employer;
- whether the risk to which the worker was exposed was the same as the risk to which he or she is exposed in the normal course of production;
- whether the injury occurred during a time period for which the worker was being paid;
- whether the injury was caused by some activity of the employer or of a fellow worker;
- whether the injury occurred while the worker was performing activities that were part of the regular job duties; and
- whether the injury occurred while the worker was being supervised by the employer.

This list is not exhaustive, and alone, none of the above factors are conclusive.

Additional information can be found in WCB's *Rehabilitation Services and Claims Manual*. Chapters 3 and 4 are very detailed. Students handling appeals should note that most causation disputes come down to matters of evidence and not law.

2. **Personal Injury or Death**

Compensation may be paid for personal injury or death that arises out of, and in the course of, employment. Section 5(4) of the WCA states that where the injury is caused by an accident that is shown to have arisen out of employment, it is presumed to have occurred in the course of employment as required for compensation. An accident can also include someone else's intentional act.

The injury need not occur while the worker is engaged in specific productive acts, so long as it occurs within the broad circumstances of carrying out the employment duties. Travelling may be considered an activity in the course of employment if travel is part of the worker's duties or if the accident occurs on the employer's property or on a "captive road" provided and controlled by the employer, for example logging roads used by wood workers.

The Kovach decision upheld the Board's policy that a worker who is undergoing treatment for a work injury remains in the course of employment, even if the treatment is taking place long after the job itself has ended (see above **Section II.D: Who is Covered**). A result of this decision is that workers undergoing treatment for an injury or disease probably cannot sue for medical malpractice.

If serious and wilful misconduct on the part of the employee is the sole cause of the injury, no compensation is paid unless death or severe disability results.

If the worker suffered from a pre-existing disability of a similar nature, permanent compensation is usually based on the difference between the new permanent disability and the pre-existing disability (s 5(5)).

3. **Occupational Diseases**

Occupational diseases are compensable as if they were work-related injuries. Section 6(1) of the WCA states that:

- i) if a worker suffers from an occupational disease and is thereby disabled from earning full wages at the work at which he or she was employed, or the death of a worker is caused by an industrial disease; and
- ii) the disease is due to the nature of any employment in which the worker was employed, whether under one or more employments;

then, compensation is payable as if the disease were a personal injury arising out of and in the course of that employment.

The date of disablement will be treated as the occurrence of the injury. This may result in the worker receiving nothing but healthcare benefits for diseases with a long latency period such as asbestosis and most cancers. These healthcare benefits can include, for example, medical benefits, necessary adjustments to the residential home, and homecare. If a worker's disease causes death, the worker's spouse may be entitled to survivor benefits, even if the worker was not eligible for compensation.

Consult Schedule B of the WCA for a list of occupational diseases the Board recognizes as arising from specific types of employment or industries. For example, where a worker was, at or before the date of disablement, employed as a coal miner, silicosis is compensable, unless it is proven to have been caused by non-work factors.

If the worker, at or immediately before the date of the disablement, was employed in a process or industry mentioned in the second column of Schedule B, and the disease contracted is the disease in the first column of the schedule set opposite to the description of the process, the disease will be deemed to have been due to the nature of that employment unless the contrary is proven. The omission of a disease from Schedule B does not mean that no compensation is payable. However, a presumption of causation only arises for diseases mentioned in Schedule B. Other diseases may be recognized by regulation, or in a particular case. For example, a waitress or bartender working in a smoking environment may file a claim for second-hand smoke causing lung disease. Evidence that the disease is caused by the employment is required. If a fire fighter suffers a heart attack, the presumption is contained in s 6.1 of the Act itself.

NOTE: WorkSafeBC has developed the Exposure Registry Program, which is designed to be a forum for workers, employers or others to report work-related exposures. This registry is intended to track incidents of exposure to substances which are known to be harmful (such as asbestos), as well as exposures which may in the future be shown to cause disease (such as power line emissions). The information obtained through the registry will create a permanent record of a worker's exposure and will assist WorkSafeBC in establishing that the manifestation of a disease was due to the nature of the employment in which the worker was employed (a requirement under s 6(1)(b) of the WCA). This will simplify the adjudication of future claims for occupational disease caused by workplace exposure.

3. Psychological Injuries

A worker can claim for acceptance of diagnosed psychological conditions and aggravations of such conditions that arise from physical injuries like chronic pain and pain-related disability. Psychological limitations and

restrictions can often be an overlooked aspect of an injured worker's reduced employability. The causal threshold is the standard causal threshold of whether the accepted physical injury is a significant contributing cause of the psychological condition meaning something more than a trivial or insignificant factor (it does not need to be the sole or even most significant cause).

A worker can claim for purely psychological injuries from their work (psychological conditions that do not arise from a physical injury), though the threshold for causation is higher for certain types of direct psychological injuries, such as bullying and harassment. Under section 5.1 of the WCA and policy item #13.00 a worker can claim for a purely psychological condition that is either:

- i) A reaction to one or more traumatic events arising out of and in the course of employment; or
- ii) Predominantly caused by a significant work-related stressor, including bullying or harassment, or a cumulative series of such stressors, arising out of and in the course of employment.

The mental disorder must be diagnosed by a registered psychiatrist or psychologist. Mental stress arising from a decision by the worker's employer related to the employment (e.g. a change in job description or working conditions, termination of employment) is specifically excluded from compensation.

However, an employer may not communicate a management decision in any way it wants and communication that humiliates, intimidates, or amounts to bullying, harassment, threats or abuse may be beyond 5.1(1)(c) protection.

4. Hearing Loss

Significant hearing loss caused by exposure to industrial noise in the course of employment is compensable. The worker must submit tests showing the loss of hearing and complete a special application form listing all employment and non-employment noise exposure. See s 7 and Schedule D of the WCA.

5. Conditions Resulting from Work in Conjunction With Other Factors

Where the personal injury or disease is superimposed on an already existing disability, the worker will be compensated only for the proportion of the disability that may reasonably be attributed to the work-related personal injury or disease. The measure of the disability attributable to the personal

injury or disease is – unless it shown otherwise – simply the magnitude of the difference between the severity of the worker’s disability before the claim date and the severity afterwards.

Where the work combines with non-work factors to cause a new disability, the worker may be compensated if the work was a significant cause of the disability. It need not be the primary cause; the proportion of the disability attributable to the work-related injury can be less than 50 percent. Work outside of BC is regarded as non-work exposure for compensation purposes. However, workers compensation boards across Canada have entered into an “interjurisdictional agreement” that provides for reciprocal coverage of some disabilities arising from work exposure or activities in different jurisdictions, and also enables the ruling Board to administer a claim in another province. The Board may try to apportion benefits in cases where the disability is partially caused by non-work or out-of-jurisdiction factors according to the percentages of causation – at least when assessing a pension – although it is not clear that the Act authorizes this.

6. Injuries that Occur Outside of BC

If an injury occurs while the worker is working outside of the province, and the injury would normally entitle the worker or the worker’s dependents to compensation, WCB will pay compensation if:

- a) the employer’s place of business is located in the province;
- b) the worker’s residence and usual place of employment is in the province;
- c) the employment requires the worker to work both in and out of the province; or
- d) the worker’s out-of-province employment immediately followed the worker’s employment by the same employer in the province, and the out-of-province employment has lasted less than six months.

K. Benefits

NOTE: In a sense, BC has **two** Workers’ Compensation Systems that work in tandem. One system pertains to injuries which occurred before June 30, 2002 and the other to injuries which occurred on or after June 30, 2002. The following section will discuss injuries that occurred on or after June 30, 2002. **If your client was injured prior to June 30, 2002, be aware that different rules apply.** Refer to the *Rehabilitation Services and Claims Manual* for more information. Volume I of the Manual applies to most injuries that occurred

prior to June 30, 2002, while Volume II applies to injuries that occurred on or after June 30, 2002.

A key element of all benefit calculation is the worker's "average earnings", i.e. the amount of income the worker received over an appropriate period of time before the injury. This is calculated as 90 percent of the worker's net (take home) pay. The Board must use the exact previous one-year earnings of the worker except for narrowly defined exceptions. Actual employment income is averaged over the whole preceding year. This can make it difficult for some workers to receive a fair benefit rate where they had irregular earnings prior to their injury.

If the worker received employment insurance (EI) benefits for part of the preceding year, these may be relevant to the calculation of benefits. Under s 33(3.2) of the *Amendment Act 2002*, EI benefits are included in the calculation of the worker's earnings for the year if the worker was, in the Board's opinion, employed in "an occupation or industry that results in recurring seasonal or recurring temporary interruptions of work".

WCB benefits are adjusted annually according to inflation, at a rate 1 percent less than the actual inflation rate. There is also a 4 percent cap on inflation adjustments, regardless of whether the actual inflation rate is higher. This **applies to all workers**, including those injured before June 30, 2002.

It is also important to note that under s 35.1(8), **a recurrence of an injury is treated as a new injury**. Thus if a worker was injured before June 30, 2002, and then had a recurrence at some point after this date, the recurrence would be treated as a new injury and the benefits would be awarded at the newer rate.

However, a "recurrence" must be distinguished from a "deterioration". In *Cowburn v Worker's Compensation Board of British Columbia*, 2006 BCSC 722, the court found that it was patently unreasonable to treat a deterioration in a worker's disability as a recurrence of an injury. Accordingly, when a worker's permanent disability that began before June 30, 2002 becomes worse, the increased benefits are based on the older provisions that were in force when the disability first arose.

1. **Temporary and Permanent Compensation**

Compensation may be paid for lost earnings and lost earning capacity. Benefits are based on 90 percent of the worker's net (take home) pay.

2. **Short Term and Long Term Wage Rates**

During the "**initial payment period**", the first 10 weeks of compensation, the wage loss rate is determined by looking at what the employee was actually earning at the time of the injury. The Board does not consider the worker's actual income tax, EI or CPP deductions in determining benefits in the first 10 weeks of the claim. Instead, benefits for all workers are based on 1.5 times

the basic personal deduction allowed under the *Income Tax Act*, RSC 1985, c 1 (5th Supp.) for a single taxpayer, plus the standard EI and CPP contributions. For single workers, this results in benefits during that period of only 90 percent of the worker's take home pay. Workers who have several dependants and hence much lower actual tax deductions, who would otherwise be entitled to a higher level of benefits, are instead assessed the same way as single workers.

The Act allows the Board to determine average earnings differently if a worker's pattern of employment at the time of injury was "casual in nature". Where this is found to be the case, the worker's earnings over the immediately preceding 12 months of employment are considered a more accurate reflection of the lost wages. (Consequently, the average earnings calculated at the outset of the claim will be the same as those calculated as long-term earnings later in the process.) Practice Directive #C9-9 describes a two-step investigation procedure to determine whether a workers pattern of employment is casual in nature. This can be found at www.worksafebc.com under the "Regulation and Policy" heading, "Practices" subheading, "Rehabilitation and Compensation Services" link. Where the job at the time of injury is scheduled to last for three months or longer, the worker will not be considered a casual worker. Where the job is scheduled to last for less than three months then the employee may be considered a casual worker if he or she has a history of short term jobs (less than three months in length) with significant absences from employment between them (greater than the time spent employed). The result is that a "casual worker", who may have been earning a good wage at the time of the accident, is likely to be eligible for less compensation during the initial payment period than his or her counterpart in a "permanent" job.

The Board reviews the wage rate after 10 weeks of benefits, and recalculates a **long-term wage rate**. The process of calculating long-term wage rates is far more rigid than it was under the previous system. Section 33.1 of the Act sets the immediate preceding one year earnings as the default time span with which to calculate the long-term wage rate, with few exceptions. The wage rate is the basis for all temporary, permanent and rehabilitation benefits that are paid under the claim, thus the Board has far less authority to establish a fair rate that really reflects the worker's lost earnings.

For example, a worker who earned \$3000 per month take-home pay at the date of the injury may have been laid off for six months of the previous year due to local economic conditions. If the worker is in what the WCB considers a "highly seasonal" occupation, any EI benefits the worker received while laid off would add to the earnings; otherwise, only the wages the worker received during the six months of actual employment would count. But the Board is required to divide this income over 12 months, so the worker's average earnings would be reduced to \$1500 per month and the benefits would be based on 90 percent of that amount, or \$1350 if the worker is totally disabled.

The Act does allow the Board to determine average earnings differently, in “exceptional” circumstances if the one-year average would be “inequitable” (s.33.4). This provision does not apply in the case of “casual” workers (in which case the 12 month average is rigidly applied) or “permanent” workers who have been employed for less than 12 months (in which case 33.3 is used). See Practice Directive #C9-12; an exceptional case has been interpreted to mean one that is “truly extraordinary”, “unusual”, or “irregular”, such that “the worker’s circumstances in the year prior to the injury fail to provide any meaningful measure of their employment history”. Examples might include a non-compensable illness or injury, or maternity/paternity obligations. To arrive at the long-term average earnings figure that better reflects the worker’s loss of earnings, officers may: i) exclude a significant atypical disruption (i.e. one lasting more than six weeks) from the calculation of the worker’s long-term average earnings; and/or ii) base the worker’s long-term average earnings on a longer period of time (e.g. 24 months) or on a shorter period of time.

In the case of a worker who has been working, on a “permanent” basis, less than 12 months for the pre-accident employer, section 33.3 of the WCA allows earnings to be calculated based on what a person of similar status employed in the same type and classification of employment would earn in 12 months. Section 33.3 is not applicable where the employment is determined to be temporary.

3. Temporary Wage Loss Benefits

Temporary wage loss benefits are paid for time lost beyond the day of the injury, for a period as long as the worker suffers temporary (total or partial) disability. As discussed above, an assessment of the wage rate will take place after 10 weeks, and consequently the benefits payable may change at that time to better reflect lost long-term earnings. These benefits cease once a worker’s condition stabilizes or “plateaus”. Partial temporary wage loss benefits are relatively rare and only paid where there is actual evidence of suitable employment immediately available to the worker notwithstanding the injury. Usually, the Board recognizes the worker’s right to full wage loss benefits until he or she can return to some type of employment, or until the condition appears to have stabilized.

4. Income Continuity Benefits

Although classified as rehabilitation benefits (described below), these are payments to provide interim support for the worker while the amount of a permanent disability pension is determined. A worker’s advocate should always request these benefits as they are often the only source of income a worker will have between the time the worker’s condition stabilizes and the time the pension benefits are assessed. These are short-term, temporary benefits. If a worker refuses employment, he or she may be refused income-

continuity benefits. See Policy C11-89.10 in the *Rehabilitation Services and Claims Manual* for more information regarding the assessment of income continuity benefits.

5. Vocational Rehabilitation

Vocational Rehabilitation benefits have been drastically cut since 2002, because of changes to the Board's policies and practice, although the key provision of the Act, s 16, has not been changed. The annual expenditures on vocational rehabilitation are now a small fraction of what they were in 2001.

Rehabilitation benefits are discretionary benefits, which can include:

- monthly compensation (in the same amount as wage loss benefits) to support a worker during a rehabilitation program;
- payment of tuition, books, and other costs of the course itself;
- a job search allowance (also in the same amount as wage loss benefits) to support the worker while looking for suitable employment if he or she cannot return to the pre-injury job; and
- a training on the job allowance or wage subsidy to encourage an employer to allow the worker to learn new employment skills, or gain experience in a new field.

Whenever a worker is unable to return safely to his or her old occupation, an advocate should request a referral to a WCB rehabilitation consultant.

Rehabilitation decisions can be reviewed by the WCB's Review Division but its decisions cannot be appealed to the Workers' Compensation Appeal Tribunal. A worker may receive retraining if he or she is unable to return to the previous job, if the previous job is a risk to the worker's health, or if the previous job would put the worker at a long-term disadvantage. If a worker is cooperating with re-training, he or she should be continued on benefits at the full wage loss rate. If the benefits are cut but the worker thinks he or she is cooperating, an appeal should be filed. Rehabilitation will usually be provided only as necessary to restore the worker to the same earning capacity as the long-term wage rates determined by the Board. This is another good reason to review the wage rate decision.

In fatal cases, a surviving spouse may be eligible for retraining.

Policies C11-85.00 to 91.00 in the *Rehabilitation Services and Claims Manual* set out the five phases of vocational rehabilitation:

- Phase One: A WCB Vocational Rehabilitation Consultant will make an effort to assist the worker to return to the same job with the same employer (the “accident employer”).
- Phase Two: If the worker cannot return to the same job, the Board consultant works with the accident employer to make worksite accommodations and job modification, or to provide alternative in-service placement, with a view to finding the worker a new position within the accident employer’s business.
- Phase Three: If the employer is unable or unwilling to accommodate the worker, the consultant identifies suitable occupational options in the same or related industry.
- Phase Four: If the worker is unable to return to employment in the same or related industry, the consultant explores opportunities in all industries, with emphasis placed on the worker’s transferable skills, aptitudes and interests.
- Phase Five: If the existing skills are insufficient, the consultant uses training programs to help the worker acquire new skills. In addition, the consultant assists the worker to secure employment once training is complete.

6. Permanent Disability Pensions

Once a worker’s condition has stabilized or “plateaued”, i.e. is not likely to get significantly better or worse, temporary wage loss benefits will cease. If the worker continues to have some disability, he or she will be assessed for a permanent disability pension. A disability pension is possible if WCB determines the worker has been left with a permanent disability.

A case manager will determine which conditions or injuries are permanent and refer the worker for assessment. Decisions not to refer a worker at all and the injuries to be assessed are appealable to the Review Division and, if necessary, WCAT.

If the worker has a **permanent total disability**, the WCB must pay the worker a monthly payment that equals 90% of the worker’s average net earnings. Some examples of permanent total disability are paraplegia, quadriplegia and total or near blindness.

For **permanent partial disability**, the vast majority of workers will only receive a Permanent Functional Impairment (PFI) award. For exceptional cases where the PFI award is inadequate, an additional Loss of Earnings (LOE) award will be provided.

All permanent disability pensions are paid until age 65, unless if the worker can convince the WCB otherwise (discussed in detail below).

NOTE: Workers who also qualify for Canadian Pension Plan (CPP) disability benefits will have one-half of those benefits deducted from their WCB pensions (this could amount to as much as \$577 per month, half of the \$1153 maximum currently payable by CPP). This deduction represents the employer's share of the benefits paid for the same disability as the WCB claim. If a CPP pension is partly based on non-compensable disabilities, no deduction will be made for that proportion of the CPP.

a) Loss of Function Method

The first calculation, for permanent partial disability pensions, (called "Permanent Functional Impairment") compares the worker's degree of physical impairment to that of a totally disabled person. The percentage of impairment is usually based on the RSCM's Permanent Disability Evaluation Schedule (PDES).

Generally, only disabilities that could reduce earning capacity receive compensation, and there are no payments for pain and suffering or loss of enjoyment of life. The Board's policy manual contains detailed schedules of percentage disability for different types of disabilities. Types not listed are estimated, and there is usually some degree of discretion in the process.

Policy item #39.10 says the PDES is meant to be a guideline and not a rigid formula. The WCB is free to apply other variables in arriving at a final award, but they must relate to degree of impairment and not social or economic factors, or rules established in other jurisdictions.

Note that loss of function awards for chronic pain are capped at 2.5% per area of pain.

b) Projected Loss of Earnings Method

This second calculation, for permanent partial disability pensions, (called the "loss of earnings method") compares the long-term wage rate that a worker was able to earn per year before the injury to that of what the worker is able to earn after the injury, based on occupations that are suitable for and reasonably available to that worker.

Loss of earnings pensions will only be paid where the amount determined under the loss of function method would leave the worker with a significant loss of earnings, i.e. where the disability resulting from the work injury makes it unlikely that a worker can continue in the occupation at the time of injury or adapt to another suitable occupation, without incurring a significant loss of earnings. (See WCA s 23(3.1) and Item #40.00 in the *Rehabilitation Services and Claims Manual*). Practice Directive #C6-2 further defines “significant loss of earnings”. A 25% or greater percentage differential between pre-injury and post-injury earnings is considered significant. A 5% or less percentage differential is not considered significant. Anything in between could be considered significant, depending on the individual circumstances of the case. Note that the Practice Directive is not binding law, but is still persuasive.

Where workers are unable to replace their pre-injury earnings, the WCB often “deems” them capable of earning significantly more post-injury than they actually are earning or can earn following an injury. For example, a worker who cannot return to a pre-injury job that paid \$4000 per month may find new employment for \$2000 per month. Instead of accepting the worker’s own experience, the Board may decide that over the long term the worker can find a different kind of job that pays \$3000 per month, and calculate the benefits accordingly. Instead of getting a loss of earnings pensions representing the actual \$2000 per month the worker is losing, he or she would a pension based on the \$1000 the Board “deems” him or her to be losing. Common problems workers face in these situations are that the Board may underestimate the actual extent of physical or psychological limitations they have due to their injury and/or pre-injury background, underestimate the demands of the deemed occupations the Board says they can perform, and/or overestimate what they actually capable of earning over the long term in the deemed occupations, therein deeming them capable of theoretical earnings that far exceed what is reasonably suitable for and available to them. On appeal of the loss of earnings decision (and often the VR rehabilitation plan decision), the worker will provide evidence

c) Benefits after Age 65

Pension benefits typically end at age 65 for work injuries that became permanent prior to the 2002 legislative and policy amendments. Policy item #41.00 states that payments for permanent disability pensions end at age 65 unless the WCB is satisfied the worker would have retired at a later date. The worker is asked to provide independent verifiable evidence at the time of the permanent disability award (or on appeal) that he or she had plans prior to injury

to work beyond age 65. This type of evidence can often be unavailable. A series of WCAT and RD decisions have held that if independent verifiable evidence is not available, the available evidence including workers' statements should be considered to be determine whether the worker had plans prior to the work injury (or in some cases prior to the time of the permanent disability award). See for example WCAT-2014-00467, identified as "noteworthy" on the WCAT website. Where for example the worker had sincere plans to continue working past age 65 due to some combination of emotional and financial need, this may be sufficient to extend the pension.

7. Medical Aid Benefits

The Board must pay for necessary medical treatment, including physicians and hospital bills, physiotherapy, drugs, artificial limbs, hearing aids, and special transportation. Allowances for personal care and for structural alterations to the home may also be paid to paraplegics and other severely disabled workers.

The Board has the right to supervise a worker's treatment (s 21) and to authorize any surgery. If a worker decides to undergo surgery or other treatment that is not authorized by the Board, the costs may not be paid, and if the injury is worsened by the treatment, benefits may be cut off or reduced. The Board usually agrees to pay for surgery recommended by the worker's own doctor, but the doctor should ask for the Board Advisor's approval. The Board often refuses to pay for drugs or physiotherapy its advisors consider unnecessary. Notwithstanding the 75-day rule, the Board now agrees that each Medical Aid decision can be appealed.

8. Benefits in Fatality Cases

NOTE: For deaths that occurred on or after June 30th, 2003, the following rules apply. Different rules may apply to deaths that occurred prior to June 30th, 2003.

- A child eligible for compensation includes a child under 19 years of age and a child under 25 years of age who attends a school
- Benefits are not lost upon re-marriage, and survivors' pensions are not terminated when the worker would have reached age 65.

Where death results from a compensable injury or industrial disease, the surviving dependants may receive lump-sum payments or monthly pensions based on the deceased worker's earnings. These pensions cannot exceed the statutory maximum, and are adjusted in accordance with changes in the

Consumer Price Index. The amount of the pension for spouses without dependent children depends on the surviving spouse's age (s 17).

A separated spouse may receive benefits based on the amount of support the deceased worker would likely have contributed had he or she survived (s 17(9)). A common law spouse is entitled to benefits after three years of cohabitation or after one year if there are children. However, compensation may not be paid, or may be reduced, if there is a separated spouse as well.

Dependant benefits may be suspended when children reach 19, or 25 if they are still attending school. In older cases, a spouse of a deceased worker who remarried might have lost his or her benefits. Under the new legislation, there are no such exclusions. Instead, s 19(2) states that a person whose payments were discontinued under a former section is entitled to complete payment of all benefits that he or she would have been entitled to – as though the section had not applied.

9. Suspension of Benefits

Benefits may be suspended:

- a) if a worker persists in unsanitary or injurious practices, which tend to **prevent or slow recovery**;
- b) if a worker refuses to submit to medical or surgical treatment, which, in the opinion of the WCB, is **reasonably essential** in promoting recovery;
- c) if a worker fails to attend a medical examination arranged by the Board;
or
- d) if a worker is in prison, in which case benefits will cease, or be paid to his or her dependants.

The Board may also divert compensation from a worker for the benefit of his or her dependants if the worker is not supporting them.

Under s 57.1 of the WCA, the Board may withhold or reduce benefits for any period the worker does not provide requested information (unless the Board finds that it was unclear in communicating the requirement, or erroneously concluded that the worker was being uncooperative). However, such benefits will be paid when the worker provides the necessary information.

10. Emergency Assistance

Many workers need immediate income if they are waiting to be accepted or their benefits have been disallowed or terminated. They should consider

alternate sources: social assistance, which may provide a crisis grant for immediate temporary relief or longer term relief if a decision is being appealed; EI sickness benefits; CPP disability pensions; any plans available through their place of work or union; ICBC (if an automobile was involved); or private disability insurance.

L. Claims Procedure

1. Reporting the Injury

All injuries that cause a loss of work, or which could lead to a future claim, should be reported **as soon as possible** by the employee or, if death results, by the employee's dependants, to the superintendent of the place of employment, first aid attendant, or other official. Claims have been denied (at least until an appeal took place) because a worker waited even a few days, hoping the pain would go away. In all but the most minor cases, workers should also seek medical attention promptly.

The employer must complete a report to the Board within **three** days of receiving the employee's report, or immediately if death results. The attending physician also completes a Physician's First Report within three days of first seeing the worker, and fills out progress reports after each visit

2. Election

In certain cases, an employee may choose to sue the person or company responsible for causing a work injury rather than making a claim for Workers' Compensation. If the injury is caused by a person not covered by the WCA (i.e. a delivery driver injured by a private citizen in a motor vehicle accident), then the worker can elect to sue a non-covered "third party" instead of claiming compensation. The Board can also sue the third party in the worker's name; this is termed "subrogation". If the worker claims compensation, the Board has exclusive jurisdiction to decide if it will take legal action against a third party. If it does take action and recovers more than the total value of the worker's benefits, the worker receives the difference minus a 29 percent administration fee. If the Board recovers less than the total value of benefits, the worker will keep the full compensation. A worker cannot waive or assign his or her right to compensation. An "election" is an important and complex decision (see s 10 of the WCA) and workers should be referred to the Workers' Advisors Office online at www.labour.gov.bc.ca/wab, before deciding whether to claim compensation. If a worker chooses to pursue court action, and is unsuccessful or the award is less than he or she would have received under the compensation regime, the worker may still be able to receive compensation. However, the original claim for compensation must have been made within the time limits outlined below.

3. **Making a Claim**

An employee has **one year** to make a claim for compensation under s 55 of the WCA. This may be extended to three years in certain circumstances. In extreme cases, the Board may consider even longer extensions.

Workers can call the WCB directly to report an injury and file a claim. Teleclaim is available to workers across the province, Monday to Friday, from 8 a.m. to 4 p.m. at 1 888 WORKERS (1 888 967-5377), or #5377 for TELUS, Rogers, and Bell mobility customers. Teleclaim is designed to simplify the process, reduce the amount of paperwork and provide a personalized service based on each individual's needs. Before calling the Board to report an injury, the worker should write down the key information about the job, how the injury occurred, and what the doctor has said about the condition. The worker's statement during a Teleclaim report will form part of the claim file, and could be used as evidence in a future appeal proceedings. The Teleclaim transcript may be sent to the worker. If it is not sent, the worker should request a transcript.

4. **Procedure After Application**

The family doctor plays a crucial role in the worker's claim as well as his or her treatment. The WCA requires that the doctor file an initial report with the Board, as well as progress reports for each visit. Doctors are also required to give all necessary advice and assistance to a worker making application for compensation, including furnishing proof that may be required. Some doctors are very helpful to injured workers, while others refuse to get involved in what they consider a legal issue. Such an attitude can be very harmful if there is a medical dispute between the Board and the worker.

The Board has extensive inquiry and investigative powers. It may require the worker to be medically examined by a WCB staff doctor or by independent consultants. WCB officers called Claims Adjudicators, Disability Awards Officers, and Rehabilitation Consultants decide whether to accept the claim and what benefits, if any, should be paid. Although rarely used, the Board has the authority to conduct a formal inquiry at which the claimant and other witnesses are compelled to appear and be questioned. Important decisions occur at various times, as a result of the interaction and correspondence between various WCB officers, the worker, the family doctor, and any specialist.

5. **The Case Management Process**

The WCB operates under a case management process in cases where the individuals are recovering from complex and costly injuries and illnesses. The key features of case management include a case manager who oversees the delivery of services for the entire life of the claim. It is also supposed to

include regular multidisciplinary team meetings, clinical care planning, site visits, and a return to work plan, which sets out expectations surrounding medical treatment, physical rehabilitation, and a return to work option. In theory, the worker, union or other representative, the worker's doctors, and the employer are all expected to participate. Advocates for injured workers have found that this crucial part of the case management model is rarely followed.

6. Claims Management Solutions

On May 11th 2009, WCB launched a "Claims Management Solutions" (CMS) system to streamline and manage the claims process more effectively, and improve service to customers. CMS manages all data related to previous, current and future claims and helps integrate services throughout the life cycle of a claim. It is supposed to result in faster case handling and claim payments, more support for injured workers, and less administrative work for employers and service providers. Workers can obtain real-time access to their claim file by registering online, and can authorize a representative to have access as well.

7. Initial Decisions

Most decisions are made by front line WCB officers. The major issues to be decided are: whether the worker is covered by the WCA; whether the injury arose out of and in the course of employment; and what benefits the worker is entitled to. The most important WCB officers, and the decisions that they make, are as follows:

a) Case Manager

- Accepts or rejects claim;
- approves wage loss benefits, determines the initial wage rate, and terminates or reduces wage loss benefits;
- investigates and decides "long term" average earnings, which are implemented eight weeks after the injury (10 weeks for injuries occurring on or after June 30, 2002);
- approves or rejects operations or other major treatments;
- approves workers' expenses for WCB payment;
- determines when to terminate wage loss benefits because the worker's disability is considered to have "plateaued"; and

- generally makes most decisions involving workers including whether to register the worker for vocational rehabilitation services and pension assessments.

b) Vocational Rehabilitation Consultant

- Works with the worker, employer, and union (if any) to get the worker back to work as soon as medically possible, perhaps to a modified job;
- approves job retraining courses;
- determines training allowances (usually paid at wage loss levels) and expenses in attending courses;
- can agree to subsidize a new employer for limited time;
- determines “continuity of income” benefits to bridge the gap between termination of wage-loss benefits and determination of a permanent pension; and
- assesses a worker’s long-term employability, and the earnings he or she is considered capable of achieving after the worker has “maximized” his or her earning capacity in a suitable and available job. This assessment is the core of the Disability Awards Officer’s decision concerning a loss of earnings pension. While the decision is made by the Officer, who can reject the recommendation of the consultant, the consultant’s assessment is a crucial step in the pension process.

c) Disability Awards Officer

- Determines the degree of permanent disability on a physical impairment basis; for workers whose permanent disability is considered to have occurred on or after June 30, 2002, this will determine the pension in the great majority of cases; and
- determines whether the worker has suffered a loss of earnings that is “so exceptional” that the functional pension does not adequately compensate for it.

These WCB employees, together with a number of other WCB “players,” interact considerably during initial decision processes. For example, a projected loss of earnings assessment, while made by a Disability Officer, is based on a report from the Rehabilitation

Officer stating which jobs are suitable and available to the worker, and what earnings could be anticipated. Throughout a claim, the Board's salaried medical staff (doctors, psychologists, etc.) are consulted regularly regarding medical issues, and their advice is regularly accepted by the Board over that of the worker's own family doctor and specialist if there is a dispute.

d) Disability Awards Committee

- Approves all “so exceptional” decisions; and
- approves all loss of earnings pension awards

e) LSLAP Representative's Role at the Initial Decision Level

LSLAP students may only assist workers with a few formal procedures at the initial decision level. However, the student's role at this point is still important. If the initial claim is done well, appeals may be avoided. These types of inquiries are usually done by correspondence, but may be in person at the worker's request.

One important aspect of the CMS data management system is the “portals” which allow workers, employers and representatives to access claim files directly. The worker needs to call the Board and obtain an ID and PIN in order to do this. Such access allows an advocate or advisor to see exactly how the claim has been handled.

Students should get a copy of the file and review the relevant documents with the worker. They may also request that the Board provide an opportunity to make submissions prior to the final decision. Some officers will comply these requests.

It is important to help a client prepare the best possible case at this level. For example, a projected loss of earnings assessment always includes an extensive interview between the Vocational Rehabilitation Consultant and the worker regarding the types of employment that are suitable and available to the worker. The worker should be prepared for this interview, and should be ready to explain issues such as: what he or she is capable of doing, what job activities he or she cannot perform, and why this is the case. The Board rarely decides that a worker is 100 percent disabled, and workers should therefore be discouraged from expecting such a ruling, unless there is very strong medical evidence of unemployability.

In addition to filing an appeal, a student can contact the officer who made the decision to request that it be reconsidered on the basis of

significant new evidence, or to seek further explanation of the officer's reasons. Note that this must take place within 75 days of the original decision.

Initial decision-making at the Board level is extremely important, and very informal in its procedure. In general, if a representative doesn't understand how or by whom a decision will be made, or what factors will be considered, it is always possible to call the Board and ask. The Claims Manual, Workers' Advisors Office, and other sources of information mentioned in **Section I: Introduction** of this chapter can also help prepare a successful claim. See **Appendix A** for a checklist for a student conducting a client interview.

8. Claim Acceptance

If the claim is disallowed, the worker will receive a decision letter outlining the reasons for rejection. If the worker has not received such a letter, the student should contact the Board and request an explanation.

Some common reasons why a claim is rejected are:

- a) the employee waited too long to report to the employer or to apply;
- b) the injury did not occur in the course of employment, or was not caused by the employment;
- c) the injury was due to pre-existing degenerative conditions (such as back injuries); or
- d) the employee did not meet special requirements for "mental stress" injuries under s 5.1.

Ambiguous medical evidence often leads the Board to decide that the work-causation was not established. Even if the worker's doctor is supportive, the Board will frequently refer the claim to one of its medical advisers, who may disagree with the treating physician's opinion.

9. Appeals

For most issues, the first level of appeal is to the Review Division of WCB. Certain issues may undergo a second level of appeal to the Workers' Compensation Appeal Tribunal (WCAT).

a) Reopening a Case – Workers' Compensation Board

Reconsiderations Are Very Limited. Under Bill 63, effective on March 3, 2003, s 96(2) provides that a decision may be reopened at

any time, on application or on the Board's own initiative, where there has been a recurrence of an injury or a significant change in the worker's compensable medical condition. Applicants seeking to revisit a decision to deny benefits cannot rely on s.96(2), but rather, must appeal to the Review Division.

Section 96(4) does allow the Board to "reconsider" **any** past decision, on its own initiative, but 96(5) prohibits it from doing so if a decision is more than **75 days old** unless there has been fraud or misrepresentation (such as when a videotape may show that the worker is less disabled than claimed). The Board interprets this to mean that the reconsideration must be completed, not just initiated, by the 75th day, and staff have been advised that they cannot correct even an error of law after that time, or change a decision to give effect to persuasive new medical evidence not available when the original decision was made. In such cases, an appeal to WCAT is the prescribed recourse.

b) Internal Review - Workers' Compensation Review Division

A worker, a deceased worker's dependant, or an employer may request a review of any of the following decisions of the Board: i) a decision respecting a compensation or rehabilitation matter (e.g. denial of benefits, or quantum of benefits); ii) a decision levying payment by the employer for failure to comply with the statute; or iii) a decision respecting an occupational health or safety matter.

The Review Division may also reconsider its own decisions in some cases. It can only undertake such a reconsideration during the first **23 days** after the decision is made, and only if no appeal has yet been filed to the WCAT (Workers' Compensation Appeal Tribunal). The Internal Review Division's powers are slightly greater than the Board's – it can change a decision on the basis of new evidence that didn't exist or couldn't have been presented previously with "due diligence" on the part of the applicant. Even that authority, however, ends on the 24th day. This means that for decisions that cannot be appealed to the WCAT, like vocational rehabilitation issues and many pension amounts, there will be no way for anyone in the system to change an incorrect decision based on new evidence, even if it could not possibly have been presented earlier and shows conclusively that the decision was wrong.

c) Appeal to Workers' Compensation Appeal Tribunal (WCAT)

A worker, a deceased worker's dependant, or an employer may appeal most decisions of the Review Division to WCAT.

The following classes or decisions may **not** be appealed to WCAT (ss 239 and *Workers Compensation Act Appeal Regulations*, BC Reg 321/2002):

- i) Decisions respecting vocational rehabilitation (s 16);
- ii) amount of a functional pension if the possible range is 5% or less, and commuting a pension into a lump sum payment (ss 23 and 35)
- iii) decisions applying procedural time limits specified by the Board under s 96(8) of the Act;
- iv) decisions refusing to allow an extension of time to file a request for review (s 96.2 (4));
- v) decisions relating to the conduct and procedural policies implemented by the Review Division for the internal review (ss 96.4(2) to (5) and 96.4(7));
- vi) orders by the chief review officer as to whether or not to suspend the operation of a decision pending completion of the review (s 96.2(5));
- vii) decisions about whether or not to refer a decision back to the Board following completion of the Review Division hearing (s 96.4(8)(b)); or
- viii) decisions respecting the conduct of a review in respect of any matter that cannot be appealed to WCAT under s 239(2)(b) - (e) of the Act.

d) Limitation Periods and Timing of Decisions

The time limit for applying for an Internal Review is 90 days. Workers must always take care to file a Request for Review within 90 days of the date of the decision. Workers are not required to submit arguments at the Request for Review stage, but only to file the Request for Review form, which includes some basic information and a brief description of what denied benefits they are seeking and why. Therefore, if the 90-day limit is approaching, it is far more important to submit the Request for Review on time than it is to ensure you have fully stated your reasons for review – those could always be added to later. If a worker has missed the 90-day time limit they should file the review and request an extension of time providing reasons why they are late—the Chief Review Officer can grant an extension of time if good reasons are shown.

Most Internal Review Decisions must be made within 5 months (150 days). The Act now requires that the internal review officers complete their review of the Board's decision within **150 days** of the date when the request for review was made.

The time limit for appealing to WCAT is 30 days. If a worker or employer is unhappy with the outcome of the internal review, they must appeal to WCAT within 30 days.

Most WCAT Decisions must be made within 6 months (180 days) of receiving the Claim File from the Board. This general time limit can be extended by the chief review officer due to the complexity of the matter, a request by the worker or employer, or the need to await a pending decision on another claim raising similar legal or policy issues.

Direct Appeals from WCB to WCAT (90-day time limit). There are certain types of appeals which go directly to WCAT without the decision first being reviewed internally. These include appeals over a decision regarding alleged discrimination by an employer against a worker for making a claim, or reporting a safety violation.

e) **Policy is Binding**

Section 99 of the WCA states that all decisions "shall be given according to the merits and justice of the case and where there is a doubt as to any issue and the disputed possibilities are evenly balanced, the issue shall be resolved in accordance with that possibility which is favourable to the worker". However, the Internal Review Division and WCAT are legally bound to follow WCB policies, even if they conflict with the merits and justice of the case (WCA, ss 99 and 250). If WCAT's panel feels that a policy is illegal, it must be referred to WCB's Board of Directors for ultimate determination. In effect, these provisions have elevated "policy" to a new form of subordinate legislation.

f) **Access to Files**

Under the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, all workers have the right to receive a copy of their file. Employers have the right to obtain a copy of the Board's file if an appeal is pending, or a decision is made. The Act, however, limits an employer's ability to use this information in non-employment related issues. An employer, for example, may not use the information contained in the employee's file for disciplinary purposes.

An employee's WCB claim file that is disclosed for purposes of an appeal or a Freedom of Information request should contain all of the information pertaining to the Board's decision, as well as copies of any decisions regarding the claim.

Prior to May 2009, a file was divided into various sections such as: Claims, Medical, Accounts, and Memo. Usually the papers were filed in chronological order. Files are organized differently under the CMS data management system. Now, the preferred method of disclosure is by way of an encrypted pdf. file on a CD. The first disclosure will be a complete copy of the file, not just an update.

Overall the adoption of electronic (E-file) rather than paper files has reduced administrative delays due to files being in use by other departments at the WCB or WCAT, but it has also decreased the detailed information explaining how decisions were reached, as handwritten notes and other documents are sometimes omitted. A request for disclosure under the *Freedom of Information and Protection of Privacy Act* usually results in a more thorough search for such records, and is advisable in cases where all information is needed. At times, the Board may not disclose all of the relevant evidence in its possession. One reason is that certain departments at the Board, such as the Vocational Rehabilitation Department, keep unofficial sub-files or documents in draft form, which may not be fully incorporated into the worker's electronic "claim file". Some of the missing information may be helpful for appeals, such as the actual observations of the Board's staff during a functional evaluation, rather than just a final report.

g) Appeal Procedure – Workers' Compensation Review Division

A complete account of the review process goes beyond the scope of this chapter. A good starting point in preparing a review of the Board's decision is to go to www.worksafebc.com and look for the "Review and Appeal" section, under the "Claims" menu. There is a Policy and Procedures Manual that describes the process in detail, as well as provides the necessary forms and applications. Limitations as to what kinds of decisions can be appealed, and what persons can appeal them, are clearly stated within this section.

To request a review, the worker must complete and submit a two page Request for Review form (available online). This form may be submitted by mail or by fax. See **Appendix B: Checklist for Review Division Appeals**.

h) Appeal Procedure – Workers’ Compensation Appeal Tribunal

Similarly, the best starting point to prepare an appeal to the WCAT is to go to the website: www.wcat.bc.ca. The “How to Appeal” section provides information regarding the appeal process, enables access to various appeal forms and provides internet links to WCAT publications as well as other resources that can assist in the appeal process. The WCAT site also contains a detailed manual. Parties applying for reconsideration must write to Tribunal Counsel Office. WCAT will not accept applications for reconsideration by telephone. Note that WCAT can reimburse workers for the cost of acquiring medical reports that are reasonably useful to the hearing.

i) Direct Appeals to WCAT

Certain appeals go directly to WCAT without being reviewed internally. These include decisions regarding alleged discrimination by an employer against a worker for making a claim or reporting a safety violation.

10. Reconsideration of WCAT Decisions and Judicial Review

WCAT decisions are “final and conclusive”, but are subject to reconsideration based on statutory and common law grounds. If you are successful, the original decision will generally be found void, in whole or in part, and a WCAT panel will hear the appeal once again.

a) Statutory Grounds: Reconsideration Based on New Evidence

Section 256 (3) of the WCA allows for a party to a completed appeal to apply for reconsideration of a decision based on evidence which:

- is substantial and material to the decision, and
- did not exist at the time of the appeal hearing or did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.

If you apply for reconsideration based on new evidence, you must explain:

- why the new evidence is substantial (has weight and supports a different conclusion);
- how it is material (is relevant to the decision);

- whether or not the evidence previously existed; and
- if it did exist previously, why you did not discover (and submit) it at the time of the original hearing.

A claimant can only apply once for reconsideration on new evidence. They will not be able to re-apply multiple times for any new evidence that might become available in the future.

b) Common Law Grounds: Reconsideration Based on Jurisdictional Defect

WCAT may reconsider a decision to correct a jurisdictional defect. Presently, WCAT understands “jurisdictional defect” to mean an error that a judge would set aside on judicial review. This could include:

- breaches of the rules of “natural justice” (i.e. procedural defects);
- errors of law with respect to jurisdiction; and
- patently unreasonable errors of fact, law or exercise of discretion that do not involve jurisdiction.

(1) Two-Stage Process of Reconsideration

The first stage results in a formal written decision, issued by a WCAT panel, determining whether there are grounds for reconsideration. If the panel concludes that there are no grounds for reconsideration, WCAT will take no further action on the matter. If a panel decides that there are grounds for reconsideration, the original decision will then be found void (in whole or in part) and the application will proceed to the second stage at which a WCAT panel will hear the appeal once again. The WCAT will decide whether the second stage will be conducted by oral hearing or written submission.

WCAT has the authority to reconsider both WCAT and Appeal Division decisions. WCAT does not, however, have the authority to reconsider decisions by the former Review Board or the current Review Division. Objections to those decisions will be treated as appeals, or applications for extensions of time to appeal.

It is important not to apply for reconsideration until you are ready to proceed as a party may apply for reconsideration of

the original WCAT decision on each ground on one occasion only.

In view of the finality of these provisions, especially where a decision has not been appealed, any worker who is not completely satisfied with a decision should request a review by the Review Division and if allowed, an appeal to the WCAT. This will preserve a residual right to present new evidence in the future, even if the appeal is unsuccessful.

WCAT's Manual of Rules of Practice and Procedure is accessible online at www.wcat.bc.ca. WCAT decisions are accessible at the same web site under "research". If you want to view previous WCAT decisions made on applications for reconsideration, you can select "reconsideration grounds," under "type of decision".

c) **Judicial Review**

A party may apply for judicial review of a WCAT decision by the British Columbia Supreme Court **within 60 days** of the date on which a decision is issued. Under certain circumstances the court may extend the time for applying. **Possible judicial review cases should be referred to lawyers as it is very difficult to file and conduct a judicial review without a lawyer's assistance.** See **Chapter 20: Public Complaints Procedures** for more information about judicial review.

Note that if judicial review and reconsideration are both possible, it is advisable for the worker to file their paperwork for judicial review within the 60-day time limit and then apply for reconsideration. This ensures that they will still be able to pursue judicial review if their reconsideration is denied.

11. **The WCB Fair Practices Officer (Formerly "Chief Complaints Officer" and before that "Ombudsman")**

The WCB has a Fair Practices Officer, who has been assigned to deal with issues of alleged unfairness related to the WCA. A claimant who has a complaint about a decision must first pursue all available routes of appeal. The Fair Practices Officer may investigate a complaint after all routes of appeal are exhausted. Individuals or groups with complaints about the fairness of WCB decisions, recommendations, actions, procedures, practices, or regulations may contact the WCB Complaints Officer by phone, fax, mail, or in person.

The WCB Fair Practices Officer should not be confused with the province's Ombudsman, who still has authority to investigate complaints against the WCB. The BC Ombudsman's policy is to suggest that all complaints go first to the WCB Chief Complaints Officer, but a worker may ask that the provincial Ombudsman intervene immediately, or if the Fair Practices Officer is unable to resolve the problem. Advocates are beginning to make more complaints to the BC Ombudsman recently, and students can insist that this be done if the complaint process seems ineffective. See **Chapter 20: Public Complaints Procedures**.

III. APPENDIX INDEX

- A. CHECKLIST FOR WORKERS' COMPENSATION INTERVIEWS
- B. CHECKLIST FOR REVIEW DIVISION APPEALS
- C. SAMPLE AUTHORIZATION BY WORKER OR DEPENDANT FORM

APPENDIX A: CHECKLIST FOR WORKERS' COMPENSATION INTERVIEWS

- ❑ Obtain basic client information
- ❑ Note WCB claim number
- ❑ Determine worker's claim status:
 - a) Present benefits
 - b) On what basis
 - c) Pending changes
 - d) Relevant decisions
 - e) Pending appeals
- ❑ Review worker's claim in full detail:
 - a) Date of injury
 - b) Nature of injury
 - c) Circumstances of injury
 - d) Client's job
 - i) Remuneration
 - ii) Duties - job description
 - iii) Length of Employment
- ❑ If claim was accepted, determine:
 - a) Initial benefit rate
 - b) Did benefit rate change after 10 weeks?
 - i) Evidence of long-term earnings given to WCB
 - ii) Client's actual work and earnings history
- ❑ Any medical treatment and diagnosis
 - a) Client's position
 - b) Doctor's advice
 - c) Board's position
- ❑ Permanent disability
 - a) Return to previous job
 - b) Return to another job with same employer
 - c) Retraining
- ❑ Long-term loss of earnings?

- a) Other advisor or representatives
- b) Workers' advisor? Trade Union? Other?

APPENDIX B: CHECKLIST FOR REVIEW DIVISION APPEALS

- ❑ Interview client
- ❑ Review his or her documents
- ❑ Immediately take note of time limits applicable – they are always to be adhered
- ❑ Contact the WCB for necessary clarification, reconsideration based on new evidence, etc.
- ❑ Advise client on alternatives such as an application for reconsideration based on new evidence, keeping in mind that the decision is not more than 75 days old since that would prohibit a Board from reconsidering it.
- ❑ File Request for Review application form if instructed by client. Ensure the time limit is met.
- ❑ Request copy of file from Board (this can be done before an appeal is filed if time permits).
- ❑ Review client's file with him or her
 - a) Any correspondence
 - b) Medical file
 - c) Memoranda
- ❑ Identify key issues leading to the decision - examine all aspects
- ❑ Research important issues
 - a) Medical - consult family doctor, specialist, etc.
 - b) Policy - read Claims Manual, relevant Reporter decisions, etc.
- ❑ Decide on the basic grounds for appeal and relief sought
- ❑ Apply for permission to make a late appeal of a related decision, if necessary
- ❑ Prepare and gather the evidence
 - a) Client's testimony
 - b) Other witnesses
 - c) Documents:
 - i Medical legal reports
 - ii Affidavits or letters from unavailable witnesses
 - iii Income tax returns, etc.
 - Ask Review Division to subpoena non-cooperative witnesses
- ❑ Prepare submissions - do this in writing, as with a trial book
- ❑ Hearing
- ❑ Receive and review Review Division findings with client
- ❑ Consider further appeal to Workers Compensation Appeal Tribunal

APPENDIX C: SAMPLE AUTHORIZATION BY WORKER OR DEPENDANT FORM

AUTHORIZATION BY WORKER OR DEPENDANT

I, _____, residing at _____
(Print Name) (Full Address)
_____, _____
(City & Postal Code) (Telephone Number)

authorize the following:

(Print Name/Title of Representative)

(Representative's Full Address/Organization Name)

(Postal Code) (Telephone Number) (FAX Number, if available)

to be my representative respecting Workers' Compensation Board ("WCB") matters, including any review before the Review Division.

I authorize my representative to obtain or view, from any source whatsoever, including records of physicians, qualified practitioners or hospitals, a copy of records pertaining to my examination, treatment history, and employment. For the purpose of reviews, I consent to the WCB disclosing to my representative the contents of my WCB claim file(s) or any other WCB file(s) or related information to which I am eligible to receive disclosure. I further authorize my representative to act on my behalf in providing evidence and submissions in reviews of such WCB files.

I also acknowledge the WCB may obtain or view, from any source whatsoever, a copy of records respecting the matter(s) under review.

This authorization shall remain in effect for two (2) years, or until I revoke it in writing or until my death, whichever is earlier.

Signature of Worker or Dependand

Date

April, 22, 2003