



# BCTF

**British Columbia Teachers' Federation** A Union of Professionals  
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July 10, 2019

Janet Patterson  
Workers' Compensation Review  
PO Box 97122 Stn Main  
Richmond, BC V6H 8H3

Dear Ms. Patterson,

**Subject: BC Workers' Compensation Review**

The British Columbia Teachers' Federation (BCTF) represents over 43,000 public school teachers and associated professionals in the province. We are pleased to have the opportunity to provide a formal submission to the Ministry's Workers' Compensation Review (the Review), which identifies six specific issues falling within the mandate of this review.

The purpose of this submission is to provide the Review with the official position of the BCTF respecting policy and other reforms at WorkSafeBC (the Board) and the Board's enabling legislation, the *Workers Compensation Act* (WCA).

In our view, the current WCA, its accompanying policy manual entitled the *Rehabilitation Services & Claims Manual Vol. II* (RSCM Vol. II), and the current practices of the Board do not adequately protect and address the actual needs of injured workers.

We recommend that the Board implement Paul Petrie's 41 recommendations in the March 31, 2018, Report: *Restoring the Balance: A Worker-Centred Approach to Workers' Compensation Policy*.

In addition to the recommendations included in Mr. Petrie's report, the BCTF endorses the following 18 recommendations respecting amendments to policy, legislation, and Board practice.

**Recommendation No 1. Claims Management: Injury Recovery Guidelines**

It is the current practice of the Board to conclude temporary disability payments (relying on the opinion of a Medical Advisor) based on injury recovery guidelines for same-type injuries using their official disability guidelines (ODG), sources from medical journals, American Medical Association texts, etc.

The BCTF supports the Board reforming this practice by abandoning the "one size fits all" approach to injury recovery timelines and to focus on the individual needs and circumstances of the worker.

Rationale: a minority of workers will have a prolonged period of recovery from their injuries. Research indicates a wide disparity in recovery times and outcomes for some injuries. This may be particularly true for head injuries, which are also known as mild traumatic brain injury (mTBI) or concussion.

### **Recommendation No 2. Claims Management: Head Injuries**

The BCTF supports the formation of a dedicated team of case managers assigned to head injury claims, as is the practice with activity-related soft tissue disorder claims, mental health claims, and the new traumatic (violent) injury claim team.

Secondly, the BCTF supports the Board adopting a shift in practice by recognizing the complexity of head injury/mTBI through adoption of a multidisciplinary approach to rehabilitation, which recognizes the value of not only physicians and neurologists, but otolaryngologist/ear, nose, and throat (ENT) specialists, physiotherapists, optometrists, ophthalmologist/neuro-ophthalmologists, psychologists, etc.

Thirdly, the BCTF supports the Board putting into practice an individualized approach to claims management focusing on the individual needs and circumstances of the worker, and providing, as needed, multi-modalities of treatment for head injury/mTBI.

Finally, the BCTF recommends the Board abandon a “one size fits all” approach to injury recovery. Research suggests gender differences in the susceptibility, severity, duration of head injury/mTBI, and wide variance in recovery times among the head injury population.

### **Recommendation No. 3 Mental Health Claims: Threshold for Claim Acceptance**

It is the current practice of the Board that mental disorder claims require that the traumatic events/work-related stressor be “unusual” to meet the threshold for acceptance.

The BCTF supports Paul Petrie’s recommendation, specifically to remove the word “unusual” and to include a subjective element to the definitions under the policy.

Rationale: amending policy to remove “unusual” from the definitions will improve mental health claim adjudication. The present definition suggests that traumatic and stressful events have become normalized in the work environment; for a teacher, this may mean aggressive or otherwise unmanageable behaviour by students would be excluded from compensation.

### **Recommendation No. 4. Mental Health Claims: Post-traumatic Stress Disorder (PTSD)**

It is the current practice of the Board that a presumption exists in favour of coverage for first responders diagnosed with PTSD.

The BCTF suggests that this presumption should also apply to teachers.

Rationale: teachers, in their unique work environment, are exposed to significant levels of violence and/or trauma, e.g., from students. The education sector is second only to the health care sector in the number of violence-related time-loss claims. According to the Board’s Statistical Services, Business Information & Analysis Department, 153 time-loss violence claims

filed by teachers were accepted between 2014–2018, with 6,448 work days lost under these claims, that is an average of over 42 days of work lost per claim. If the legal presumption in favour of coverage were extended to teachers, it would mean more teachers diagnosed with PTSD would become eligible for much-needed coverage by the Board.

**Recommendation No. 5 Mental Health Claims: Bullying and Harassment**

Under policy, it is the current practice of the Board to set a high bar for claim acceptance of mental stress due to bullying and harassment. Under the Board’s current definitions, interpersonal conflict, bullying, and harassment are not generally considered significant unless the conflict involves behavior that is considered threatening or abusive.

The BCTF supports the adoption of a more flexible approach which considers the differential impact actions and statements will have on an individual, i.e., the subjective experience of the worker. Instances of bullying and harassment can be much more nuanced than a direct threat or an explicitly abusive statement or action.

Due to their sensitive nature, when adjudicating bullying and harassment claims, we suggest that Board Officers be directed to take the least invasive investigative approach possible to competently adjudicate the claim. For example, many if not most decisions regarding benefits entitlement can be made after obtaining disclosure from the worker’s mental health practitioner and from interviewing the worker. Third-party investigation reports and independent psychological assessments should only be used for claim adjudication when absolutely necessary.

**Recommendation No. 6 Activity-related Soft Tissue Disorder (ASTD) Claim Adjudication**

As with mental health claims, under policy the Board currently sets a high bar for acceptance of ASTD claims. Application of claim adjudication policy involves a complex analysis of risk factors as well as the study of the mechanics of the employment activity in question, usually through a worksite evaluation.

The BCTF supports the simplification and streamlining of ASTD policy as well as the improvement of the investigative process.

Rationale: the high threshold for claim acceptance creates a barrier to claim acceptance, denying many workers much-needed support. Anecdotally, workers complain about the efficacy of the ASTD worksite evaluation, reporting that the process lacks thoroughness and that the evaluation may last as little as 10 minutes. This evidence is then relied upon by a Board Medical Advisor when opining on work causation.

**Recommendation No. 7 Health Care Benefits: Medical Cannabis**

It is the current practice of the Board’s Evidence Based Practice Group to reject cannabis as an effective treatment except to treat/alleviate the symptoms of epilepsy and some occupational cancers.

The BCTF recommends that the Board immediately implement a flexible, case-by-case approach to medical cannabis requests, relying on the statements of the worker and the worker's attending physician as to the efficacy of medical cannabis. The Board should make good faith efforts to research the efficacy of medical cannabis with the goal of adopting fair, objective measures for when to authorize prescription coverage of medical cannabis and its derivatives.

Rationale: there is a lack of empirical peer-reviewed research studies that suggest cannabis is effective to treat or alleviate the symptoms of conditions such as chronic pain. However, empirical research studies are generally funded by the pharmaceutical industry. Since the pharmaceutical industry has not ventured into the patent market in cannabis until very recently, there has been a lack of economic incentive for the pharmaceutical industry to research the efficacy of medical cannabis to treat conditions such as chronic pain. Given the widely recognized negative health consequences of other treatments (such as opioids or nonsteroidal anti-inflammatory drugs), our position is that it is in the public interest to give workers a choice.

### **Recommendation No. 8 Health Care Benefits: Vision Therapy**

It is currently the practice for many Board Medical Advisors, such as ophthalmologists, to reject vision therapy as an effective health care treatment.

The opinion amongst Board Medical Advisors (MAs) is divergent as to whether vision therapy is an effective treatment for head injury and visual/vestibular problems. Accordingly, the Board is inconsistently adjudicating access to this treatment—some MAs will approve it while others reject it outright, so whether a worker will gain access to this expensive treatment is “luck of the draw.”

The BCTF recommends that the Board immediately implement a flexible, case-by-case approach to vision therapy requests, relying on the statements of the worker and the worker's attending optometrist or ophthalmologist as to the efficacy of vision therapy. The Board should make good faith efforts to research the efficacy of vision therapy and train medical advisors to apply a consistent approach.

Rationale: many members of our union report benefits from vision therapy treatment from optometry doctors who are experts in their field, such as Dr. McCrodan and Dr. Rollett. In most current cases, vision therapy must be funded by the union and/or the worker.

### **Recommendation No. 9 Health Care Benefits: Continuity of Treatment for Permanent Conditions**

It is the current practice of the Board (based on Medical Advisor opinion) to conclude health care benefits when the worker's condition is deemed permanent. The Board has many rationales for concluding health care benefits. For example, benefits are often concluded if the worker has been provided a “home exercise” program by the physiotherapist or if the worker's condition isn't expected to significantly improve. Therefore, there will be minimum benefit from ongoing treatment, or, conversely, the worker has been receiving treatment for an extended period of time with little noticeable or measurable improvement in their condition.

The BCTF supports continuity of health care treatment when a condition has become permanent, when it is appropriate to do so.

Rationale: workers often do not have the space, equipment, or skills to follow an exercise program in their own home. The Board does not normally pay for fitness memberships, which allow workers access to gym space and equipment. Ongoing health care treatment may be necessary to maintain the worker at a medical plateau; many workers complain that their condition deteriorates when health care treatment is discontinued.

### **Recommendation No. 10 Health Care Benefits: Multidisciplinary Approaches to Health Care Treatment**

It is the current practice of the Board to pay for only one modality of treatment, despite many workers benefitting from a multidisciplinary treatment approach.

Workers who are admitted into Board-sponsored rehabilitation programs are normally provided with multidisciplinary treatment, so the Board recognizes the efficacy of a multidisciplinary approach to rehabilitation and health care treatment.

The BCTF recommends that the Board fund the optimal number of treatment modalities specific to the individual needs and circumstances of the worker, relying on the advice of the attending physician.

### **Recommendation No. 11 Pension Awards: Duration of Payment to Age 75**

The current Board practice is that permanent partial disability and loss of earnings awards are payable to a standard age of retirement, age 65, unless certain conditions are met.

The BCTF recommends that these awards be payable to at least age 75. The Board should accept post-injury evidence and intention to reflect that a person may have to work longer than they originally planned due to their injuries and absence from the workforce.

Rationale: workers are remaining in the workforce for longer durations due to a variety of factors, including cost of living, limited retirement savings and, higher life expectancy. Many workers who face long-term disability from the workforce due to their injuries have reduced retirement savings.

### **Recommendation No. 12 Changes to the Maximum Wage Rate**

It is the current practice of the Board to set a maximum wage rate which is adjusted annually using the cost-of-living adjustment (COLA).

The BCTF supports an increase to the ceiling or an elimination of the maximum wage rate, which currently sits at \$84,800 (2019).

Rationale: workers with higher earnings that exceed the maximum wage rate are penalized financially by the wage rate ceiling. These workers suffer a greater loss of earnings as they are not truly compensated at 90% of their net earnings.

### **Recommendation No. 13 Payment of Interest on Retroactive Benefits**

It is the current practice of the Board that no interest is payable on retroactive awards.

The BCTF recommends that the WCA be amended to include payment of a reasonable rate of interest on retroactive financial awards, including temporary wage loss, permanent partial disability, and loss of earnings awards.

Rationale: workers who have payments withheld while participating in the appeal process are unduly penalized financially, as they may wait up to several years for rightful payment of wage loss, permanent disability, and loss of earnings awards.

### **Recommendation No. 14 Legal Standing in Administrative Appeals**

It is the current practice under the WCA that the employer, the worker, and/or their surviving dependent(s) have legal standing to initiate and participate in reviews and appeals of Board compensation decisions. The employer also has legal standing to initiate and participate in appeals of relief of cost decisions. Workers and their surviving dependents are not a party to relief of cost appeals.

The BCTF recommends an amendment to the WCA by removing the legal standing of the employer from the appeal process for compensation matters.

Rationale: it is debatable whether employer participation in compensation appeals adds any value to the process. Compensation decisions, and the appeals of these decisions, have a disproportionately greater financial impact on individual workers than on organizations. Employers can unduly cause delay in payment of financial and health care entitlements by appealing compensation decisions, even when there is no merit to the appeal. It is therefore in the best interest of workers that employers have no legal standing to initiate or participate in appeals of compensation matters.

### **Recommendation No. 15 Independence of the Appeal Bodies**

The Review Division is vested as the first level of appeal under the WCA. The Review Division is a department of the Crown Agency, WorkSafeBC. The Workers' Compensation Appeal Tribunal (WCAT) is vested as the second and final level of appeal under the WCA. Unlike the Review Division, the WCAT is a Crown Agency independent of WorkSafeBC.

The BCTF supports the appointment of an independent examiner to study the feasibility and desirability of making the Review Division an independent Crown Agency.

Rationale: the Review Division is a division of the Crown Agency that it deliberates on. The lack of independence of the Review Division creates an apprehension of bias. The Government of BC should examine whether it is in the public interest, and more consistent with the duty of fairness, that both WCAT and the Review Division be wholly independent of WorkSafeBC.

### **Recommendation No. 16 Reforming the Structure and Function of the Appeal System**

The BCTF supports the appointment of an independent examiner to study the structure and function of the workers' compensation appeal system, with the objective of improving its efficiency and effectiveness.

Rationale: appeals of Board decisions may take several years before they are finally resolved. The appeal process has been criticized as being overly complex and/or ineffective for both workers and employers. While the Review Division has implemented technology enhancements to improve service delivery, the WCAT lags far behind in adopting technology or making other changes to enhance service delivery. An independent examiner should look at reforming the appeal system to improve the efficiency and effectiveness for the benefit of workers and other stakeholders.

### **Recommendation No. 17 Procedural Changes to the Decision-making Process in WCAT Appeals**

It is the current practice of WCAT that the vast majority of appeals before the Tribunal are adjudicated by a panel of a single decision maker called the Vice-Chair.

The BCTF recommends that appeals before the WCAT should be adjudicated by a panel of three decision-makers.

Rationale: prior to legislative amendments implemented in 2003, many appeals were adjudicated by panels of three decision-makers. The WCAT is the final level of appeal in the administrative tribunal system established to resolve disputes over workers' compensation matters. Decisions of WCAT are final and binding, with very limited grounds for judicial review.

As decisions of the WCAT can have significant financial repercussions on the workers impacted, the decisions of the Tribunal are too important to leave in the hands of a single decision-maker. It is in the public interest and consistent with the principles of natural justice to increase the accountability of the Tribunal by requiring three-person panels for WCAT appeals.

### **Recommendation No. 18 Legislate a Duty to Accommodate under the WCA**

There is currently no legislative duty under the WCA for employers to accommodate injured and permanently disabled employees.

A duty to accommodate creates an obligation on the part of employers to modify their policies or practices to allow disabled workers to return to the workplace and participate fully. The duty to accommodate is enshrined in Canadian human rights law.

The BCTF recommends that the WCA be amended to include a duty for employers to accommodate injured workers, and that this be reflected in any revisions to policy.

Recent jurisprudence provides further guidance on this issue. In *CNESST v. Caron*, 2018 SCC 3, the Supreme Court of Canada upheld an earlier decision of the Quebec Court of Appeal respecting an employer's duty to accommodate. This decision confirmed that an employer has a duty to accommodate a worker who has suffered an employment injury, while both Quebec's

Commission de la santé et de la sécurité du travail (the Quebec workers' compensation board, CNESST) and Administrative Labour Tribunal have a duty to determine whether a worker has been validly accommodated by the employer.

Finally, in this decision, the Supreme Court of Canada held that the duty of reasonable accommodation applies to a worker who has suffered an employment injury, notwithstanding the fact that the *Act respecting industrial accidents and occupational diseases* (Quebec's version of the WCA) does not expressly address the duty to accommodate. The Supreme Court of Canada held that the legislation must be interpreted in light of the Quebec *Charter of Human Rights and Freedoms*, a core principle of which is the duty to accommodate.

Thank you for your consideration.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Teri Mooring', written in a cursive style.

Teri Mooring  
President

TM/LO/smd:tfeu