Workers' Compensation Act Committee of Review, 2021

Recommendations of The Office of the Workers' Advocate, Labour Relations and Workplace Safety

Saskatchewan

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Letter of Submission

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Workers' Compensation Act – Committee of Review
300 – 1870 Albert Street
Regina SK S4P 4W1

Dear Committee Members:

I am pleased to provide you with the recommendations from the Office of the Workers' Advocate on improvements and/or reform of *The Workers' Compensation Act, 2013,* the regulations and the administration of the Act and regulations.

Respectfully submitted,

Executive Director
Office of the Workers' Advocate

Copy: Greg Tuer, Deputy Minister
Sameema Haque, Assistant Deputy Minister
Labour Relations and Workplace Safety

Introduction

The Office of the Workers' Advocate (OWA) appreciates the opportunity to provide recommendations to the Workers' Compensation Act Committee of Review with the aim of improving *The Workers' Compensation Act, 2013* and its administration through the practices, policies, and procedures of the Workers' Compensation Board of Saskatchewan (WCB).

The OWA is authorized to provide advocacy services pursuant to section 161 of the Act. We provide legal advice and representation services for individuals with claims before the WCB. OWA advocates are not required to be lawyers and are exempt under *The Legal Professions Act, 1990;* they are however, trained in administrative law and in the interpretation of WCB legislation, policies, procedures, and appeal processes.

In the course of our work, OWA assists clients by:

- reviewing WCB claims and giving advice to clients on how to proceed;
- explaining the WCB claims management and appeal processes;
- assisting clients in preparing for an appeal, including analyzing legal issues, identifying and preparing legal arguments, and assembling relevant evidence; and,
- providing representation at all levels of the appeal process, including speaking to WCB staff, providing written submissions, and representing clients at an appeal hearing.

Since 1973, we have provided advice and representation to thousands of injured workers, most occupational groups, and employers large and small. We investigate and appeal claims related to physical, psychological, and occupational injury. Issues we investigate include, but are not limited to, claim denial, termination of benefits, vocational rehabilitation, estimation of earnings, wage base, suspensions and overpayments.

OWA represents more injured workers in the WCB appeal process than any other single organization or representative. Due to the number of claims we review, the variety of injuries involved and the number of issues that we appeal, we are in a unique position to assess and comment on the effectiveness of the Workers' Compensation system for the injured workers of Saskatchewan.

The WCB and OWA share a mutual objective. This is to ensure injured workers receive every consideration and every entitlement due, under the provisions of the Act.

- Shared common goals include: Ensuring that the Workers' Compensation system is fair, accountable and responsive to the needs of injured workers in Saskatchewan.
- Ensuring that the injured workers in Saskatchewan receive the benefits that they are entitled to pursuant to *The Workers' Compensation Act, 2013,* in a timely manner.

With these shared goals, the following group of designated representatives from WCB and OWA hold regular quarterly meetings: WCB – director of operations, manager of Appeals Department, team lead of Board Appeal Services, fair practice officer, and manager Corporate Policy; and from OWA – manager of Advocacy Services, and executive director. The group participates in the development and implementation of issues resolution initiatives which support improved communication, information sharing, and overall efficiency of the workers' compensation system.

Notwithstanding, there are still issues and recommendations this office is presenting for consideration in this report.

Publication of Board of Appeal Tribunal Decisions

Issue Description:

There are significant costs and consequences resulting from the Board Appeal Tribunal decisions for both injured workers and employers. Without access to view Tribunal decisions, interested parties are not afforded the opportunity to better understand the Tribunal's decision making. Publishing the decisions would also allow for a more transparent system.

Recommendations:

- **That the Board Appeal Tribunal publish their appeal decisions to promote transparency and accountability.**
- **Amend Section 23 of the Act stating all decisions shall require reasons for the decision, and to include clarification of the significance of the evidence used to make the decision.**

Analysis:

Published decisions can provide information to interested parties about the Tribunal's decision-making process, including practices a Tribunal follows and the evidentiary tests they apply. The reasons provided in a decision explain to potential appellants in clear, plain language, the criteria for considering or adjudicating issues, or the procedures for pursing a remedy.

The majority of workers' compensation tribunals in Canada, aside from Saskatchewan and the Northwest Territories, publish their tribunal decisions. The Manitoba Appeal Commission for example publishes all their decisions, after the removal of all personal identifiers from the decision(s) before making them public. Examples can be found at https://www.appeal.mb.ca/public-decisions

British Columbia enacted the Administrative Tribunals Act governing all tribunals in that province. Part 7 – Decisions includes the following:

- 50(4) The tribunal must make its decisions accessible to the public.
- 51 The tribunal must make its final decision in writing and give reasons for the decision.

To meet their obligation under 50(4) British Columbia's Worker's Compensation Appeal Tribunal has developed criteria that is applied in selecting key decisions for publication. Some examples where the criteria are used include decisions that may:

- Assist individuals in pursuing a remedy or providing representation on compensation, assessment, or other matters by explaining in clear, plain language the criteria for considering or adjudicating issues, or the procedures for pursing a remedy.
- Aid in the understanding of workers' compensation by offering a thorough analysis of a significant concept or a new insight.
- Summarizing the legislative history behind a key statutory provision.
- Set out a thorough analysis of law and policy in relation to a key issue.

Even if the decision is not published it is helpful to have rational for the decision. WCB has three dedicated policies on decision-making; one for adjudicative staff in operations, one for Appeals Department staff, and one for the Board Appeal Tribunal. OWA finds the expectations and guidelines expressed in these policies to be very clear and indicate that written explanations of decisions are to be provided.

In Chapman v Saskatchewan Workers' Compensation Board, 2017 SKQB 134 the court found that WCB failed to determine for the purposes of section 23(3) *decision in favour of the worker where evidence is approximately equal* if the weight attached to the evidence presented by the two sides was approximately equal. This failure to make its reasons intelligible or transparent did not allow the court to understand why the WCB made the decision it did or determine whether its conclusions were within the range of acceptable outcomes.

Conclusions:

When WCB does not provide significant rational, OWA staff are often seeking supplemental reasons to understand the application of legislation and policies in WCB's decision making process, as well as to clarify what evidence was used to arrive at their decision.

This office has made similar recommendations with respect to providing detailed written reasons to COR in our two previous submissions (2015, 2011). OWA believes that if WCB amended their legislation to require reasons for decisions had to be given, the incidents of decisions failing to provide meaningful reasons would decrease. OWA also believes that if the Tribunal made their decisions public, this would heighten accountability, elevate quality and provide transparency in WCB's decision making that would instill even greater confidence in the system overall.

Weighing Conflicting Medical Evidence

Issue Description:

There is significant medical evidence collected and reviewed in determining all issues pertaining to WCB injury claims. Currently there is no established framework to provide direction and clarity to the decision makers where conflicting medical evidence is being considered in the determination of entitlement and benefits.

Recommendations:

- **That WCB develops a weighing conflicting medical evidence policy and procedure.**

Analysis:

Section 20 of the Act affords the board exclusive jurisdiction to determine coverage and benefits with respect to a work injury claim. Medical evidence is required for the board to determine all the following:

Section 20(2)

(a) whether any condition or death with respect to which compensation is claimed was caused by an injury.
(b) whether any injury has arisen out of or in the course of employment.
(c) the existence and degree of functional impairment to a worker resulting from an injury.
(d) the permanence of a functional impairment resulting from an injury.
(e) the degree of diminution of earning capacity resulting from an injury.

There is very limited guidance specific to medical evidence provided to staff. WCB's Decision Making policy and procedure (POL and PRO 02/2019) outlines their authority to make decisions and staff's responsibility for gathering and weighing information.

In PRO 02/2019 Collecting Information 4(a) and Considering Evidence 6(b)(iii) there is specific, albeit limited, reference to medical evidence. The absence of direction means that there are no guiding principles in what constitutes a medical opinion, nor any criteria in deciding what weight to give to conflicting medical evidence, including the weighing of a WCB Medical Officer opinion.

In the decisions we are seeing, there is frequent reference and regard given to the opinion(s) provided on file by a WCB medical officer. The WCB medical officer opinion(s) are specifically referenced in staff decisions as: relied heavily on, placed emphasis on, or was guided by their opinion. In many instances the only reasons provided for the decision (denial of a claim, claim termination or the denial of an appeal) are quotes from the WCB medical officer opinion.

In Heilman v The Workers' Compensation Board, 2012 SKQB 361 the court was unable to ascertain the tribunal's reasons for denying the appeal. The court noted that the Tribunal referred to the opinions of the WCB medical department and the WCB medical consultant. In doing so, the court found that the Tribunal's reliance on these sources was an error because it fettered its discretion by delegating its decision making to the department and the consultant.

When explanations are not provided in decisions, there is no way for anyone to ascertain why a WCB medical officer opinion is given more weight than that of a contrary medical opinion on file. The board should also not be automatically preferring the opinions of one category of doctors to another category, nor should it be done by counting heads, so many opinions one way and so many the other.

However, without a policy providing clear criteria for staff in deciding what weight to give conflicting medical evidence, this leaves an impression that an arbitrary approach is taken by staff. The lack of clear criteria also leaves staff unable to explain their reasons for determining what weight they have given to conflicting medical opinion(s) on a claim.

Conclusion:

Without a policy, there are no guiding principles provided to staff regarding consideration of medical evidence. Due to the prevalence of medical evidence WCB addresses in their decision making, OWA believes criteria in deciding what weight to give such evidence is required and is consistent with other jurisdictions. This will result in more well-reasoned decisions that in turn will instill greater confidence in WCB's decision making process.

Medical Review Panels

Issue Description:

The requirement(s) placed on physicians and chiropractors of what they must include when completing Medical Review Panel Enabling Certificate applications is not only onerous, but also continues to result in a high rejection rate.

Recommendations:

- **That the WCB chief medical officer and chairperson of the Medical Review Panel consult with physicians and chiropractors to determine reasonable and clear expectations to support completion of acceptable applications with the information physicians and chiropractors have at hand.**
- **That WCB provide a *sufficient particulars* definition in their Medical Review Panels (POL 18/2010), informed by the consultation noted above.**
- **That authority be delegated to the WCB chief medical officer and the chairperson of the Medical Review Panel to determine acceptance of Enabling Certificate applications.**

Analysis:

Section 60 of *The Workers' Compensation Act, 2013* (the "Act") establishes a Medical Review Panel (MRP) as the forum by which injured workers may resolve disputes on medical issues. Medical questions from injured workers will be determined by an independent body of medical practitioners once the internal WCB appeals process has been exhausted. Both the board and the worker are bound by decision of the panel.

Section 59(2) of the Act requires that a worker or the deceased worker's dependent may request an MRP. Section 59(3) requires that this request for MRP must be accompanied by an enabling certificate. Enabling certificates must be completed by a physician or chiropractor and must answer the following three questions: that there is a genuine medical question to be determined; what it is in the board's decision they disagree with; and that they provide sufficient particulars of the question to define the issue. From our experience, it is the latter "*sufficient particulars"* that leads to the majority of enabling certificates being rejected.

Particulars are often described as details, specific points, or circumstances that will provide sufficient accuracy with respect to a set of facts. It is not unreasonable to require particulars from physicians and chiropractors completing an enabling certificate as this requirement serves to ensure their disagreement with the board's decision is based on objective medical grounds.

Under the board's current requirements however, physicians and chiropractors completing enabling certificates are required to supplement their rationale by providing medical support for their position. Such support includes providing medical literature or research in support of their opinion, or they may reference another physician's comments that would support their position on the medical question.

Section 59(3) requires that a physician or chiropractor complete the enabling certificate. They are not *appealing* on behalf of the worker; they are involved only as a result that a request for MRP cannot be made without them completing the enabling certificate application. The physician or chiropractor do so with very little information other than the Tribunal's decision from which they are expected to form their objective opinion of whether they agree or do not agree with said decision.

There are many occurrences where doctors, after reviewing the board decision, are not willing to complete an enabling certificate for an injured worker. They may be familiar with the injured worker's medical history and are unable to objectively find anything in the board decision they disagree with. They may also be less familiar with the injured worker's medical history, and there is simply not sufficient information for them to objectively disagree with in the board's decision.

Conclusion:

According to statistics available in the WCB 2020 Annual Report, between 2016 to 2020 (see below) only 24 per cent of the MRP certificates were accepted. This rejection statistic is consistent from year to year and in our opinion is indicative of a problem that needs to be addressed as workers are being denied access to a legislated dispute resolution mechanism from an independent body of medical practitioners once the internal WCB appeals process has been exhausted (on medical issues only, not of an adjudicative nature).

MRPs are the final avenue of appeal for injured workers, and the panel's findings are binding on the board and the injured worker. In developing a definition of sufficient particulars in consultation with physicians and chiropractors along with transferring authority to the WCB chief medical officer and the chairperson of the MRP to determine acceptance of enabling certificate applications, OWA believes these changes will improve injured worker's access to this final avenue of appeal.

2020 WCB Annual Report

	2020	2019	2018	2017	2016
Enabling Certificate applications received	8	23	26	20	20
Enabling Certificate applications accepted	3	4	4	4	8
Medical Review Panel examinations	2	3	4	9	5
Medical Review Panel examination decisions accepted	1	1	2	6	4

Children and Other Dependents Benefits

Issue Description:

If an injured worker dies, and their death is not due to their work injury, and where the worker was receiving benefits for 24 months or less, WCB will pay benefits to the workers' children or other dependents if there is no spouse. However, if a worker was receiving benefits for more than 24 consecutive months, no benefits will be provided to the worker's children or other dependents.

Recommendations:

- **Amend Section 93(3) of the Act adding in the equivalent provision as per Section 93(1)(b) to provide equitable compensation payment to a worker's dependent children or other dependents when there is no dependent spouse upon the worker's death that is not related to their work injury.**

Analysis:

Section 93 of the Act recognizes that the death of a worker, for causes apart from a work injury, and the sudden end of compensation can leave dependent spouses and children in a difficult circumstance.

Section 93(1)(3)

(1) On the death of a worker who was or would have been entitled to compensation pursuant to this Act for a period of 24 consecutive months or less at the time of death and if no compensation is payable pursuant to sections 80 to 86, the board shall pay an amount of compensation equal to the compensation that the worker received or would have been entitled to receive, as the case may be, with respect to a period of three months:

(a) to the worker's surviving spouse; or

(b) if the worker died leaving no dependent spouse, to the worker's dependent children or any other persons recognized by the board as being dependents.

(3) If a worker dies of a condition for which no benefits are payable pursuant to sections 80 to 86 and that worker received compensation for a period exceeding 24 consecutive months before the day of the worker's death, the board:

(a) shall pay to the worker's surviving dependent spouse a monthly allowance, equal to the monthly amount of compensation that was being paid to the worker, for 12 months following the day of the death of the worker; and

(b) may provide the surviving dependent spouse the same counselling and vocational assistance as would be provided to a worker to enable the dependent spouse to enter the labour force and become self-sufficient.

When the worker was receiving compensation for 24 months or less prior to their death, section 93(1) provides for support equal to the compensation the worker was receiving to be extended to a dependent spouse *or* a dependent child for a period of three months.

In cases where a worker was in receipt of compensation for a period exceeding 24 months prior to their death, section 93(3) recognizes a greater duration of compensation for the dependent spouse *only* for a period of 12 months. However, section 93(3) does *not* provide for any benefits to dependent children after the death of a worker where the worker was receiving compensation for a period exceeding 24 months prior to their death.

Details of the following recent case example illustrates the inequity associated with providing no support to dependents when the worker was receiving long term support exceeding 24 consecutive months prior to their death.

A worker suffered a back injury that permanently left the individual unable to return to work. The injury occurred in 2006 and full wage loss compensation was paid to the worker from 2006 until the date of their death in May of 2021 (15 years); the worker did not have a dependent spouse at the time of his death. The cause of death was not considered related to the individual's work injury and as such there was no entitlement for the dependents under sections 80 to 86 of the Act. For several years prior to the worker's death, under the terms of a separation agreement, the worker was providing monthly child support with respect to a dependent daughter (age 15 at the time of the worker's death).

The WCB reviewed the case to determine if support could be extended to the dependent child under section 93 of the Act. Because the worker had received compensation for more than 24 consecutive months leading up to the date of death, the WCB determined support could not be extended to the dependent child as per Section 93(3). Ironically, if the worker had received compensation for a shorter period (less than 24 months) before their death, the dependent child would have received support for a period of three months (Section 93(1)).

Conclusion:

The current version of Section 93 of the Act is inequitable. OWA believes our recent example supports WCB moving to amend Section 93 by adding a similar or same provision as 93(1)(b). In so doing, all dependent children whose injured worker parent dies of a condition other than the work injury would receive compensation whether the injured worker parent received benefits for less or more than 24 months.

Permanent Functional Impairment Awards

Issue Description:

The maximum amount of an award for a permanent functional impairment has not increased since 2003 and is one of the lowest of all jurisdictions. In addition, it does not fairly award workers who are left with permanent functional limitations as the result of a work injury.

Recommendations:

- **Amend Section 66 of the Act to increase the minimum and maximum award amounts payable for permanent functional impairment.**

Analysis:

Section 66 of *The Workers' Compensation Act, 2013* (the "Act") authorizes WCB to establish a rating schedule to calculate a permanent functional impairment (PFI) award. Section 66 also establishes the minimum and maximum awards payable for PFI, subject to the legislation in effect on the date of the determination of the award.

Section 66(2)

(a) *Prior to January 1, 2003, Section 66(2)(a) states the minimum amount awarded will be at least $1,100 and the maximum not more than $22,600; and*

(b) *On or after January 1, 2003, Section 66(2)(b) states the minimum award will be no less than $2,200 and the maximum not more than $45,200.*

The PFI was established to award a worker who suffers a permanent impairment as the result of their work injury. This is a one-time lump sum payment in addition to their regular compensation benefits. WCB has established *The American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides)* as their rating schedule, consistent with other jurisdictions. Once a worker is deemed to reach maximum medical improvement, WCB medical services will provide PFI evaluations based on the most current edition of the AMA Guides.

The more serious an impairment, the greater the permanent impairment payment will be. The rating of impairment calculated using the AMA Guides determines the percentage value of the impairment, with the most serious impairments receiving the highest percentages. A higher payment is made to those who suffer a catastrophic injury which could include quadriplegia, paraplegia, severe brain injury, loss of limbs, combination of impairments, etc.

Where WCB uses the AMA Guides as their rating schedule to be consistent with other jurisdictions, their maximum award payable is not consistent with other jurisdictions. Saskatchewan has one of the lowest maximum awards payable for permanent adverse reactions which interferes with the normal performance of the worker's body or mind. While there is not a consistent approach across jurisdictions in establishing the maximum awards, several jurisdictions relate the maximum award to their maximum earnings.

The SGI no fault insurance system for injuries resulting from a motor vehicle collision is also a rehabilitation-based model offering benefits that parallel those under the workers' compensation system. SGI's Permanent Impairment Payment (PIP) is a lump sum payment paid if individuals sustain a permanent impairment as the result of a motor vehicle collision. The maximum payment under PIP for catastrophic injuries is $254,087 and the maximum for other permanent injuries is $208,037. This difference in the lump payment awards is commonly noted by injured workers.

Conclusion:

WCB has not increased the minimum and maximum award amounts payable for a PFI since 2003. The current minimum and maximum amounts noted in section 66 of the Act do not fairly compensate workers for permanent adverse reactions as the result of a work injury that interferes with the normal performance of a worker's body or mind and/or leaves them disfigured. OWA believes a review and subsequent increase in the minimum and maximum award amounts is necessary to compensate workers more equitably for permanent impairments incurred as the result of a work injury.

Summary of Recommendations

Publication of Tribunal Decisions

- That the Board Appeal Tribunal publish their appeal decisions to promote transparency and accountability.
- Amend Section 23 of the Act stating all decisions shall require reasons for the decision, and to include clarification of the significance of the evidence used to make the decision.

Weighing Conflicting Medical Evidence

- That WCB develops a Weighing Conflicting Medical Evidence policy and procedure.

Medical Review Panels

- That the WCB chief medical officer and chairperson of the Medical Review Panel consult with physicians and chiropractors to determine reasonable expectations to complete acceptable applications with the information physicians and chiropractors have at hand.
- That WCB provide a *sufficient particulars* definition in their Medical Review Panels (POL 18/2010), informed by the consultation noted above.
- That authority be delegated to the WCB chief medical officer and the chairperson of the Medical Review Panel to determine acceptance of Enabling Certificate applications.

Children and Other Dependent's Benefits

- Amend Section 93(3) of the Act adding in the equivalent provision as per Section 93(1)(b) to provide equitable compensation payment to a worker's dependent children or other dependents when there is no dependent spouse upon the worker's death that is not related to their work injury.

Permanent Functional Impairment Awards

- Amend Section 66 of the Act to increase the minimum and maximum award amounts payable for permanent functional impairment.