Workers' Compensation Act Committee of Review 2015

Recommendations of the Office of the Workers' Advocate

November 2015

Government of Saskatchewan

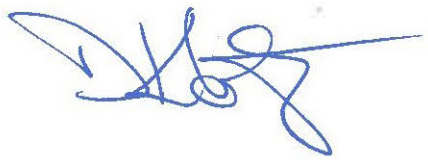
November 2015

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 or reform of *The Workers' Compensation Act, 2013*, the regulations and the administration of the Act and regulations.

Respectfully submitted,



Denise Klotz
Director
Office of the Workers' Advocate

cc: Mike Carr, Deputy Minister
Labour Relations and Workplace Safety

Table of Contents

Office of the Workers' Advocate (OWA)

Mandate

The mandate of the Office of the Workers' Advocate is to advance the interests of injured workers and their dependents with respect to their entitlements under *The Workers' Compensation Act, 2013*.

The office carries out its mandate by providing independent advice, experienced assistance and advocacy services, preparing and presenting cases for review and appeal at the Workers' Compensation Board of Saskatchewan.

The OWA provides information on:

- Applying for benefits;
- Reduction or end of benefits;
- Rehabilitation or training;
- Wage loss;
- Medical aid; and
- Survivor benefits.

Advocates will:

- Explain the appeal process;
- Determine if grounds to appeal exists;
- Give advice on actions to be taken in the appeals process;
- Investigate claims and compile information for appeals;
- Prepare written appeals; and
- Represent a worker at an appeal hearing.

"We were treated with respect at all times. Without the knowledge of our advocate, we were completely overwhelmed. This was an essential service to us."

"I felt the person handling my case was very professional, knowledgeable and understanding. I thought she was honest and very supportive through some very stressful times."

Feedback from OWA clients

Introduction

The Office of the Workers' Advocate (OWA) is pleased to provide a submission of our views, concerns and 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 Saskatchewan Workers' Compensation Board (WCB).

Our mandate is to assist Saskatchewan workers and their dependents who are victims of workplace injuries and diseases and are involved in disputes with the WCB concerning compensation claims.

Since 1973, we have provided well-needed advice and representation to thousands of injured workers, most occupational groups and both large and small employers. 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. The list of issues is extensive.

Due to the variety of injuries 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. OWA is also the organization, which represents more injured workers in the WCB appeal process than any other single organization or representative.

The WCB and the OWA share a mutual objective. This is to ensure injured workers receive every consideration and every entitlement due, under the provisions of *The Workers' Compensation Act, 2013*. 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, WCB and OWA have regular meetings to discuss policy as well as review claims management and appeal processes. OWA and WCB staff meet when possible to review decisions and attempt to explore solutions to arrive at a mutual agreement prior to the appeals process. Such practices have resulted in an increase in the number of issues being resolved benefiting the system overall.

Notwithstanding, there are still issues and recommendations OWA is presenting in this report. It is our hope the 2015 Committee of Review will endorse and build upon our recommendations with the intent of ensuring that the Workers' Compensation system is fair, accountable and responsive.

Issues and Recommendations

Issue: Calculation of Average Weekly Earnings (Section 70)

Issue Description:

The legislative change to section 70(4) of the Act limits the wage base provisions of section 70(1) for part-time, seasonal and casual employees.

Recommendation:

- **That the WCB calculates average weekly earnings as set out in Section 70(1) and only apply Section 70(4) when an injured worker was not available for employment the preceding 52 weeks.**

Background:

A critical first step when an injury claim is filed and accepted by WCB is to determine how to calculate the worker's average weekly earnings and the correct average weekly earnings amount. This calculation is used to calculate the compensation rate for the wage loss benefits; decide the extent and duration of vocational assistance; and, calculate the amount of earnings replacement benefits the injured worker will receive if there is a loss of earnings because the worker cannot return to their pre-injury employment.

Sections 68 and 70 of the Act direct how average weekly earnings are determined. In addition, Policy 29/2010 and 35/2010 [formerly Policy 29/2003 and 35/2003] provide further clarification and direction.

The issue of over and under compensation has been raised with previous Committee of Review submissions. The 2000 Review of the WCB noted that a "consequence of standardized benefits is that some workers are under compensated and some workers are over compensated[1]."

Section 70(1) of *The Workers' Compensation Act, 2013* defines **average weekly earnings** as the greater of:

> *(a) One fifty-second of the workers earnings for a period of twelve months immediately preceding the commencement of the loss of earnings as a result of the injury; and*
>
> *(b) The rate of daily, weekly, monthly or other regular earnings that the worker was receiving at the commencement of the loss of earnings as a result of the injury.*

Section 70(1) (a) appeared to favor workers with full time jobs, with two or more jobs, or who may have also earned overtime wages. The average weekly earnings for these types of workers would consist of the average of all earnings over a period of 12 months immediately preceding the commencement of the loss of earnings resulting from the injury.

[1] James E. *Dorsey, Review 2000 of the Saskatchewan Workers' Compensation Board Recurring and Current Administrative Issues*, p. 21

Section 70(1) (b) appeared to favor casual, part-time, seasonal and pieceworkers. These workers could have their average weekly earnings based on their rate of daily, weekly, monthly, or other gross earnings received at the commencement of the loss of earnings as a result of the injury. If there was any confusion or overlap between these two sections, section 70(1) allows workers to have the "greater of" either (a) or (b).

The 2000 review by Mr. Dorsey also noted that the WCB was concerned that some injured workers could be overcompensated. The WCB attempted to resolve the problem of 'over compensating' casual, part-time, seasonal and pieceworkers by shifting the focus to the meaning of regular earnings in section 70(1)(b). The WCB began experimenting with the language of section 70(1)(b) interpreting it in such a way as to deny these types of injured workers access to the favorable benefits conferred under the subsection.

The WCB told the 2001 Committee of Review that, "It continues to experience difficulties in devising reasonable policies to calculate wage loss benefits for both short-term and long-term payments that must be made." It said, "The Board welcomes any views or findings of the Committee that may help address this issue at a policy level, if not through amendment to the legislation[2]."

Section 70(4) was amended in 2002 with the word "and" changed to "or" in subsection 70(4). This amendment produced a massive effect. No longer was section 70(4) reserved for the third category of worker as noted above. By changing "and" to "or," injured workers who had not been available for employment for the full period of twelve months immediately preceding the commencement of loss of earnings, or other types of casual workers, could now have their average weekly earnings set outside section 70(1)(b). In other words, the amendment allowed the Board to use section 70(4) and not 70(1) (b) to set the average weekly earnings for casual, part-time, seasonal and pieceworkers who would be in receipt of long-term workers' compensation benefits.

Section 70(4) states:

"In determining the average weekly earnings of a worker, the Board shall take into consideration the average earnings, as determined by the Board, that were earned by a person regularly employed in the same grade of employment if:

(a) the worker was not available for employment for the full period of 12 months immediately preceding the commencement of his or her loss of earnings resulting from the injury; or

(b) in the opinion of the Board, it is inequitable, by the casual nature or the terms of the worker's employment, to compute the worker's average weekly earnings in accordance with subsection (1)."

According to section, 70(4) these injured workers could have their average weekly earnings raised and brought in line with a person regularly employed in the same grade of employment.

[2] Saskatchewan Workers' Compensation Board, *Submission to the Committee of Review September 2001*, p. 5, as found in *Saskatchewan Workers' Compensation Act Department of Review 2001 Report at 35*.

To supplement this section of the Act, the WCB produced POL 35/2010 [POL 35/2003]. This policy attempts to manage the problem of "overcompensating" casual, part-time and seasonal injured workers. POL 35/2010 point #3 states:

> *Establishing a wage rate for part-time, casual and seasonal workers is a challenging process, as these workers are typically not employed for the full 12 months prior to commencement of earnings loss or recurrence of injury, which sometimes leads to inequitable earnings loss compensation. Therefore, a policy is required that clarifies the intent of the WCB to base compensation benefits on what will most fairly and accurately represent the worker's initial and long-term loss of earnings.*

According to the policy, these injured workers will have their wage bases set at the commencement of their loss of earnings according to section 70(1). After 26 weeks, the WCB has the ability to recalculate the average weekly earnings if the earnings loss calculated according to section 70(1) is considered inequitable.

There are several issues we see injured workers face with this policy approach:

1. The policy is a departure from standardized benefits, which is characterized by deliberately over and under compensating certain workers. By altering a considered fundamental characteristic of this type of no-fault system, the WCB is adding another level of complexity to its adjudication process.

2. This policy affects workers not ordinarily considered casual, part-time, seasonal and pieceworkers. Not every worker without 52 weeks of employment prior to the injury is a seasonal or casual worker. One example is the tradesperson who works out of a union hall. If such a worker has not worked a full 52 weeks prior to the date of injury, he can, at 26 weeks, have his average weekly wage re-calculated and benefits significantly reduced. Such a re-calculation does not fairly reflect their loss of earnings.

3. Once a wage base has been set according to section 70(1) (b), it is not clear that the WCB has the authority to reduce the wage base after 26 weeks.

The following examples illustrate the application of this policy. In the cases that we see the net effect of the application of this section of the Act, there is a significant reduction in the average weekly earnings and the resulting compensation benefit. We have no way of knowing how many cases reviewed under this section of the legislation actually result in an increase in the average weekly earnings as the cases this office reviews are cases that have resulted in a decrease for the client.

Claim Examples:

1. At the commencement of the loss of earnings, average weekly earnings were calculated according to Section 70(1) of the Act using the rate of pay the worker was receiving at the time of injury. This worker was hired in June and the last day of work was in December (six months). Gross earnings during this period were $8407.10. His hourly rate of pay was $13.00/hour but when his hourly rate of pay was compared to the average of his gross earnings and then divided by the number of weeks that he worked, the greater amount was used, as it states in the legislation. Prior to starting with the pre-injury employer, the worker was receiving Employment Insurance benefits.

   His average weekly earnings were calculated by taking the average of his gross earnings for the period of approximately 23 weeks. After all the additional calculations were completed, (the actual compensation payment to the worker is 90 per cent of net earnings) his WCB benefit was $62.14 per day.

   Due to the casual nature of the employment and the lack of work during the 52 weeks prior to injury, the case manager at the WCB concluded that it was "inequitable" to continue paying him at this rate. They then reduced the average weekly earnings by dividing his gross income in the 23 weeks of work by 52 weeks. This resulted in a reduction in his daily rate of compensation from $62.14/day to $27.48/day.

   This case went to appeal and was successful. It is very interesting to note the approach the Appeals Department took. The Appeals Department noted in their decision that "*there was no information to suggest the original rate of entitlement was inequitable (too high or too low) when taking section 70(4) into consideration.*" In order to arrive at this conclusion, the Appeals Department researched labour market information for carpenters to compare wages to determine if the original wage base calculation was inequitable. Based on this research, the Appeals Department concluded that the initial calculation ($62.14) accurately reflected the injured worker's earnings and reducing the daily rate of compensation was an unfair adjustment for a carpenter. The worker's wage loss was adjusted to reflect the original daily rate initially calculated.

2. An injured worker submitted a claim to WCB for an injury that occurred in July. He was hired as a seasonal employee to work from June through August (three months). He was paid $12.00/hr for a 40-hour work week. Gross earnings for the 13.25 weeks that he worked were $9626.76. The average of gross earnings was higher than the hour rate so average weekly earnings were determined to be $726.55. For the first 26 weeks of his claim, his compensation benefit was based on this average weekly wage according to section 70(1). The case manager concluded due to casual nature of the employment, that section 70(4) would be used to recalculate his average weekly wage after he received 26 weeks of benefits.

The case manager obtained wages for the person hired to work that job the previous year. They also knew that he had wages from another employer, a trucking company, but did not include those wages in their calculation. The injured worker was also on Employment Insurance benefits until he started the summer employment. His average weekly wage was adjusted from $726.55 to $76.28 per week. The $76.28/week was the average of his gross earnings divided by 52 weeks. His actual compensation benefit was reduced from $72.70/day to $15.26/day.

The Appeals Department denied the appeal concluding, "…the method used to calculate his wage base was the most accurate long term reflection of his earnings." An appeal was submitted to the Board Appeals Tribunal, who also concluded it was correct to reduce the worker's benefits, but they directed that the wages he earned from the trucking company should be added to the earnings he made from the summer employment. The additional earnings increased the total gross in the 52 weeks prior to injury but the wage base was still the average over 52 weeks. The net result was that his weekly gross wage increased slightly to $94.54 and translated into a daily rate of approximately $18.62/day.

3. An injured worker submitted a claim to WCB reporting he was a pieceworker and earned approximately $65,000.00/year. To calculate average weekly earnings, employment earnings from all sources in the 52 weeks immediately preceding the commencement of loss can be considered. There were two employers during this period resulting in gross earnings of $33,280.78. This figure was divided by 52, which resulted in average weekly earnings of $640.00/week. The compensation benefit was calculated using this figure. The worker insisted that his earnings were much higher than that. Nothing was done about the average weekly earnings until an appeal was filed on another issue.

   The average weekly earnings were revisited. Correspondence from the employer indicated that this man could expect to earn significantly more than the average weekly wage of $640.00. The employer's estimate was $1384/week. The case manager recalculated the average weekly wage using actual gross earnings of $19,776.19 averaged over the actual number of weeks that this income was earned, in this case 15 weeks. This recalculation raised his average weekly wage to $1318.41/week, which operations considered would be more reasonable and equitable.

   Average weekly earnings were reduced on this claim after 26 weeks of benefits were paid based on average weekly earnings calculated using section 70(1). According to section 70(4), the earnings of workers regularly employed in the same grade of employment in the same industry will be averaged over 12 months to arrive at an average weekly wage. However, in this case there is no indication that any of the worker's other earnings were verified. Rather, this worker's original earnings averaged over 52 weeks was used. This method of calculating average weekly earnings resulted in a reduction in his daily compensation wage from $92.88 to $46.43.

This injured worker is not part-time, seasonal or casual. He works out of the union hall and when work is available and his name is at the top of the list he goes to work. This policy can be used to reduce the rate of compensation to a completely inequitable amount for any worker who cannot demonstrate earnings over a 52-week period.

The injured worker's earnings loss benefits were reduced after 26 weeks without obtaining earnings from workers regularly employed in the same grade of employment as set out in section 70(4). Rather, his gross earnings of $22,362.67 were averaged over 52 weeks. This calculation resulted in a reduction in his daily rate from $92.88 to $46.40.

The advocate obtained the worker's notices of assessment from Revenue Canada, which showed his earnings over the years when he was not on compensation ranged around $40,000.00/year. Therefore, basing his average weekly wage on $22,362.67 is inequitable, does not accurately reflect his true earnings, and leaves him at a severe disadvantage financially because of his work injury.

Conclusion:

In our experience, too many injured workers have had their benefits reduced by the application of Section 70(4) and Policy 35/2010. This section of the Act and Board Policy is increasingly being used when the terms part-time, casual, and seasonal are noted on the Employers' Report of Injury, which in turn reduces the injured workers wage entitlement after 26 weeks. The WCB has made changes in the legislation and policy in its efforts to address this complex issue. We believe our recommendation will address the inequities we continue to see on claim files.

Issue: No Explanation Provided For Calculation of Wage Loss Entitlements

Issue Description:

Workers, representatives and employers are at a disadvantage regarding how an injured worker's wage loss entitlements are calculated as no written explanation is provided as to how the WCB arrived at the calculation or what information was used/considered.

Recommendations:

- **That the WCB provide a detailed letter clearly explaining the rationale for initial calculation of wage loss benefits.**
- **Additionally, that WCB provide written explanations to the worker should a worker's wage loss change during the length of the claim to ensure information used is accurate.**

Background:

Over the years injured workers, representatives and employers have raised the issue of wage loss calculation, as the WCB does not clearly communicate how or why the initial wage loss entitlement is calculated. The injured workers, representatives and employers are unsure as to what information is used to calculate the worker's initial entitlement, what information they should provide, and what rationale is used to make the decision that makes it difficult to ensure the calculations are accurate.

The WCB wage loss benefits are calculated based on 90 per cent of net earnings (gross earnings minus probable deductions for Income Tax, Canada Pension Plan and Employment Insurance). Because wage loss benefits are calculated on employment income, the employer provides the information to the WCB to calculate the entitlement.

Many of the workers approaching our office state that they do not believe their entitlement from the WCB is correct. Without an easily to understand explanation or any of the details as to what information is used to make the calculation, it is difficult for a worker to ensure their entitlement is accurate. Whether it is the worker or an experienced representative, this creates a distinct disadvantage for someone to knowledgably question the calculation or to identify if the correct information is used.

The WCB does provide a summary of the breakdown of benefits on a client's paystub. While this is important information for the client to have, it does not show what calculations were used to arrive at the entitlement amount .

Conclusion:

The OWA receives numerous enquiries from clients regarding how the WCB has arrived at the calculation of their wage loss entitlement. If a detailed letter is provided to all concerned parties, outlining the information that was used in the calculation along with the supporting policies and procedures, then the worker, representative and employer would have the ability to review for accuracy and understanding of the complex wage loss system.

Issue: Lack of Complete Development of Claims in the Claims Entitlement Services Unit

Issue Description:

Claims Entitlement Services is not fully developing injury claim files prior to making the decision to deny claims.

Recommendations:

- **That the WCB's adjudicative staff complete a thorough investigation, which includes contact with the injured worker before the decision is made to accept or deny a claim.**
- **That the WCB provide detailed decision letters that clearly explain the rationale for its ruling.**

Background:

Over the years and especially since our last Committee of Review submission, we have consistently continued to receive complaints from injured workers where the WCB's adjudication staff did not contact them about the details of their claims prior to denying the claim. If the injured worker then calls about the decision, rather than being asked to submit additional information, he is told to make an appeal.

This approach causes considerable delays for the injured worker to receive benefits. These delays then may result in financial hardship and chronic disability due to the lack of appropriate medical treatment. Other government safety net programs such as Employment Insurance and Social Services may then have to bear the cost of the work injury while the client is moving through the appeal process.

The focus in Claims Entitlement is to get the decision made quickly. We agree that timeliness is important, but informed and fair decision-making is also important.

Claim Examples:

1. A worker was injured from lifting a heavy child at work on August 29. Initial medical did not take place until August 31, two days later. The Claims Entitlement Specialist (CES) contacted the employer on October 3 and the employer advised the claim should not be accepted as the client did not report the injury. No effort was made to contact the worker to discuss this allegation and the claim was denied.

   The worker contacted the CES on October 8 requesting help and according to the memo on file, the CES responded, "I could not understand what she was saying. The worker had urgent surgery on her back and the physiotherapist is saying she needs some things at home, [the worker] was advised although submitted a claim, I was unable to accept and should contact EI for sick benefits."

   This file was successfully appealed to the Board Appeal Tribunal. The advocate spoke with the worker and obtained additional information to confirm the worker did sustain an injury at work and an email was provided to the employer on the same date. The

worker spoke directly to the board members at the appeal hearing. Unfortunately for the worker, it was two years before anyone from the WCB spoke to her to determine whether or not she sustained an injury. The worker has now developed a chronic low back condition. We believe the claim could have been accepted if the time was taken at the beginning to understand the specifics of the claim.

2. Problems with lack of development when a claim is initially accepted can cause problems down the road as this example illustrates.

   Initially, the WCB accepted the client's claim and the surgeries required from the injury. The client received benefits from February 23, 2007 to September 2009. The employer submitted an appeal challenging claim acceptance. The Appeals Department accepted the employers appeal and overturned the decision accepting the claim. The Appeals Department decision noted the lack of detail in the Workers' Report of Injury. The Worker's Report of Injury simply stated pain going down leg and did not provide any detail of what the worker was doing to cause the pain running down the leg.

   At no time through the life of his claim was the injured worker questioned about what was reported on his Worker's Report of Injury. After speaking with the injured worker, the advocate discovered that the supervisor filled out the Worker's Report of Injury and the injury that occurred was due to repetitive heaving lifting of snow blowers. The board members overturned the decision to deny the claim when this new information was presented to them.

3. A worker injured her shoulder while doing her usual duties at work. Claims Entitlement denied the claim concluding that the worker did not report a specific incident. The decision letter stated, "I have been unable to confirm that an incident or injury has occurred in employment, which would account for these symptoms and this diagnosis." It is important to note that neither section 2(k) nor section 27 of the Act requires evidence of a specific incident to have an acceptable claim.

   It is also interesting to note the CES III did not speak to the worker to discuss her history or work duties before making this decision. When adjudicating an injury "arising out of and in the course of employment," it would be useful to understand the hazards associated with the job that was being done on the day of injury.

   This claim was appealed to the Board Appeal Tribunal. The board members met with the advocate and worker. During the hearing, the worker had the opportunity to explain in detail her work duties and the work she did on the day her shoulder was injured. The Board Tribunal accepted the appeal. The final paragraph of the tribunal decision read:

   > *The tribunal also notes the comments made by the OWA at the time of the hearing that no one from WCB contacted…to obtain additional information regarding her work duties and symptoms, even though an injury arising out of and in the course of employment was being considered. The tribunal agrees with the OWA on this point, as the additional information provided by…provided the basis for the acceptance of her appeal. This could have been done by the WCB case manager or the Appeals Department.*

Conclusion:

In the examples listed, all cases were successful at appeal because the advocate spoke with the injured worker, gathered additional information, whether it was from the client, a witness, treating physician, or a job description and presented the information through the appeal process. These examples support our view that many of these appeals could have been avoided if the adjudication staff did a thorough and complete development at the time the claim was first made by the injured worker, including speaking to the injured worker. To ensure fair process, if the claim is denied the injured worker must have the opportunity to be heard or to provide information that may alter the decision. Denying claims without this information is not fair or reasonable and places the injured worker in the position of going through a lengthy appeal process, possibly causing significant financial hardship and chronic disability due to the lack of timely medical treatment.

Issue: No Framework for Stakeholder Engagement in Policy Development

Issue Description:

The WCB does not currently provide for a structured process that would integrate stakeholder views and opinions in policy development.

Recommendations:

- **That the WCB commit to a policy development framework that provides for appropriate consultation with stakeholders and create a Stakeholder Consultation Policy.**
- **That the WCB include the OWA in this consultative process.**

Background:

The primary role of the OWA is to represent and advance the interests of injured workers in Saskatchewan. To this end, we extend all efforts in ensuring that injured workers and their dependents receive the benefits that they are entitled to pursuant to *The Workers' Compensation Act, 2013*, in a timely manner. We also share a common objective with the WCB, which is to ensure that the Workers' Compensation System is fair, accountable and responsive to the needs of injured workers in Saskatchewan.

In 2002, a Letter of Understanding was drafted formalizing a commitment to regular meetings between the WCB and the OWA. These quarterly meetings are used to discuss current policy as well as review of claims management and appeal processes. This relationship remains very positive as we mutually work to improve service to injured workers.

While these meetings are productive, there is presently no commitment by the WCB for active engagement with the OWA or other key stakeholders in policy development. Upon our review of the other jurisdictions across Canada, Saskatchewan is the only jurisdiction that does not have a section on stakeholder engagement written into its Act or have a stakeholder engagement policy. As one of the longest serving boards in Canada, we feel that this is an important issue and an opportunity for Saskatchewan to engage in a policy consultation process related to policies that directly impact employers, workers, and dependents.

The Meredith Principles are the foundation of workers' compensation in Canada and underscore the historic compromise in which employers fund the workers' compensation system and in turn injured worker surrender their right to sue their employer for injury. The WCB's Strategic Operational Plan includes a section "Stakeholders Perspective: Excel at Serving Injured Workers/Excel at Serving Employers." What better way to obtain a stakeholders perspective than to commit to consulting with stakeholders to the policy development process. The ultimate decision-making remains intact with the Board, but with stakeholder input for consideration.

The OWA reviews 700 to 800 claims annually and represents hundreds of injured workers in the WCB appeal process. As a representative of stakeholders, who are principally injured workers who have disputes with the WCB, the OWA is uniquely positioned to provide valuable input as to the expectations and needs of injured workers in a policy consultative process. It is for this reason that we ask that the OWA would be included in this process.

Conclusion:

Active stakeholder engagement is an increasingly important element of accountability. A commitment by the WCB to a consultation process will serve to contribute to the WCB's efforts in achieving service and management excellence and efficiency. We believe that a commitment to stakeholder consultation supports the WCB goal of ensuring that the workers' compensation system is fair, accountable and responsive to the needs of employers and workers in Saskatchewan.

Issue: Post-Traumatic Stress Disorder Currently Not in WCB Psychological Injury Policy

Issue Description:

The WCB Injuries – Psychological (POL 01/2009) does not address or provide direction on Post-Traumatic Stress Disorder claims.

Recommendation:

- **That the Injuries – Psychological (POL 01/2009) be amended to include Post-Traumatic Stress Disorder as a third category of injury, including the definition and criteria provisions for acceptance of this disorder.**

Background:

The WCB in Saskatchewan was one of the first in Canada to provide coverage for psychological injuries including coverage for chronic stress claims. POL 01/2009 includes well-established and comprehensive guidelines for adjudication of psychological injury claims, including the general requirement of a Mental Health Assessment by a doctoral psychologist or psychiatrist.

What the OWA office has identified as an issue is that this policy does not specifically address Post-Traumatic Stress Disorder (PTSD). PTSD is defined by the Canadian Mental Health Association as "a mental illness'. It results from exposure to trauma involving actual or threat of death, serious injury or sexual violence. PTSD is a delayed debilitating response to traumatic exposure.

Once someone experiences PTSD, the severity and duration of the illness varies and can begin within three months of a traumatic event but occasionally not begin until years later. Due to the significant complexities of this disorder, we believe it is imperative the WCB include clear guidance in order to provide timely and appropriate decisions on claim acceptance for PTSD claims.

In reviewing other provincial WCB jurisdictions and their approach to PTSD, we note that many have legislated PTSD as a presumptive workplace injury for first responders. This approach has been taken as first responders are seen to have greater exposure to PTSD triggers than workers in other occupations and there is some research available that speaks to that.

While we agree that there are a number of jobs that are naturally dangerous and we have successfully represented workers in these occupations, we also are reviewing more and more claims where a worker who would not normally experience dangerous or traumatic events in their normal course of work are in fact exposed to a traumatic event. It is with this experience in mind, that we suggest that policy criteria be inclusive for any worker who has a PTSD diagnosis made by a doctoral psychologist or psychiatrist and has experienced a terrifying event or ordeal while on the job.

Claim Examples:

1. The injured worker, a police officer, filed a claim for Post-Traumatic Stress Disorder. This individual's claim was denied as the WCB said he did not provide details as to incidents that were considered traumatic. An appeal was submitted as the worker had a confirmed diagnosis of PTSD. The worker, in the course of employment, was exposed to trauma. The worker was receiving psychological counselling and the psychologist indicated that individuals who suffer with cumulative exposure to trauma may have issues providing details of the trauma, even in clinical settings. The appeal was accepted and the worker was then in receipt of all benefits.

2. The injured worker, a truck driver, files a claim for Post-Traumatic Stress Disorder. This worker is in a highway accident where he was in a head on collision in the month of January. He recovered from his physical injuries and returned to work in April. It was not until months later, that he began to experience changes in his demeanor as well as experiencing recurring dreams of his earlier collision. He went to the doctor and was diagnosed with depression and then later with PTSD. This claim was originally denied by the WCB citing that he had fully recovered from his original injury. An appeal was submitted asking that the Mental Health Assessment that is indicated in policy be afforded to the client. The appeal was accepted and the PTSD was found to be related to his work.

Conclusion:

The OWA recognizes the significant complexities associated with the adjudication of psychological claims and commends the WCB on a thorough, inclusive and fair policy. With the inclusion of PTSD as a category of psychological injury in the WCB policy, we feel this would provide the clarity and direction necessary for timely and appropriate claim decisions on PTSD injury claims and in so doing ensure workers receive the benefits and treatment they require to recover.

Issue: Injured Workers Subject to Layoff While on Return to Work Program

Issue Description:

Injured workers, impacted by a layoff, subsequent to a return to accommodated employment, are not currently supported by the Board.

Recommendation:

- **That the WCB support injured workers impacted by layoffs subsequent to their return to work in accommodated duties. This can be accomplished by resuming the longstanding practice called for by the previous WCB Policy on this subject (07/96).**

Background:

Labour law and recent changes to *The Workers' Compensation Act, 2013*, obligates a duty to accommodate injured workers by providing them with duties which address the restrictions imposed by a work injury. Employers are also motivated to accommodate injured workers to reduce their compensation costs. If workers are left with restrictions that preclude their return to their pre-injury job, it is common for employers to provide suitable duties. In the majority of cases, the employer finds a collection of duties that are within the worker's current skill set and the restrictions imposed by the work injury. In many cases, a similar job or list of duties does not exist in other organizations. These situations create vulnerability for the injured worker in the event they are subject to a layoff.

The implementation of WCB Policy 02/2008 Compensation – Layoff, Strike or Lockout, changed a longstanding practice for injured workers subject to a layoff. The previous policy - POL 07/96 Compensation – Layoff, Strike or Lockout, afforded protection for injured workers impacted by a layoff subsequent to their return to accommodate employment. POL 07/96 called for benefits to be reinstated in cases where an injured worker was unable to compete for alternate employment on an equal basis to others impacted by a layoff. The previous policy recognized that injured workers with restrictions need assistance to find alternate work. After a layoff by the pre-injury employer, prospective employers have no duty to accommodate restrictions and, in many cases, the specialized job the worker was performing does not exist in other organizations, leaving these workers at a complete disadvantage to compete for other employment opportunities.

Workers disadvantaged by the restrictions imposed by a work injury can, under the current Policy, be left in a very difficult situation. Based on their existing skill set, they are not able to secure alternate jobs post layoff that pays the same wage as their accommodated position or their pre-injury wage.

Claim Examples:

1. Worker was employed as a pipefitter at time of injury. The pre-injury employer accommodated him in the office putting together binders. The company then laid off the pipefitters, including the worker. He requested wage loss benefits from the WCB and was denied on the basis he was laid off and the injury is not the cause of loss of wages.

He was still not medically cleared to return to work as a pipefitter but since there was no wage loss in the accommodated positon, the WCB refused to reinstate benefits. The Appeals Department stated it would give the worker an unfair advantage over the other pipefitters that were laid off and had to seek other employment. The file was accepted and the worker was placed on wage loss entitlement until such time as he recovered from the injury

2. Worker was employed as a spray foam insulation applicator. He sustained serious injury with permanent work restrictions that preclude return to his pre-injury job. The employer provided worker with accommodated duties and while was performing accommodated duties, the project the employer was working on ended and the worker, along with 50 to 75 other employees, were laid off. The worker has a grade 8 education and his previous work experience is limited to labouring jobs. The WCB denied a request to reinstate benefits indicating that ongoing wage loss is due to layoff versus the effects of work injury. The file was appealed and accepted on the basis he sustained a permanent work injury that precluded him from returning to his pre-injury occupation.

Conclusion:

The current WCB policy on layoffs leaves injured workers without the support they require to find alternate suitable employment and return to work. The previous policy assisted injured workers, who could not, due to their work injury, compete for alternate employment subsequent to a layoff. We suggest the WCB resume the former practice of providing injured workers with the support they require.

Issue: Board Appeal Tribunal – Internal vs External

Issue Description:

Because of long-standing delays in the appeals process and the lack of transparency in the rationale given for tribunal decisions, confidence in the current internal structure of the Tribunal continues to come under intense scrutiny.

Recommendations:

- **Maintain the current internal Tribunal.**
- **Appoint a full-time appeals commissioner as one of the members of the WCB; whose role will solely be to provide independence and accountability for the internal appeal process and whose role would not include governance.**
- **Amend Section 48 of the Act to specify that written reasons be provided on all decisions.**
- **That the Tribunal publish appeal decisions on the WCB's website to promote transparency and accountability.**
- **Amend the Board's *Governance Policy* to incorporate into the governance framework that all WCB members regularly participate in programs focusing on sound administrative tribunal practices.**

Background:

The OWA receives between 1500 and 2000 calls each year from injured workers and provides a level of service to approximately 800 of them yearly. Staff of the OWA does an average of 400 appeals each year, with this total number of appeals being made to any of the three levels of appeal in the WCB appeal process (Internal Review, Appeals Department, and Board Appeal Tribunal).

Upon review of OWA's three-year average (2012 to 2014), approximately 200 appeals per year are made to the Appeals Department and 130 appeals/year to the Board Appeal Tribunal. Staff of the OWA have been experiencing a one year or more wait time at the tribunal level for a number of years now and have seen first-hand, the significant implications this wait has on the injured worker, their families, and their employers. The OWA staff also sees the long-term implications on the health of the injured worker and the resulting implications on the health care system that this significant delay has.

The delay also affects the OWA staff as it does for any client representative. It also impacts workers who choose to file their own appeals. The appeals process stipulates that individuals need to go through each step of the process before moving on to the next level. With this comes some level of delay due to the communication of the request for the appropriate review or appeal level and then the subsequent review and deliberation that is required at each appeal level to render an informed decision.

In the first two levels of the appeal process alone, appellants generally experience a wait time of 60 to 80 days. They have to endure a further delay of one year at the tribunal level. This delay would be a minimum, depending on the potential for further case development;

seeking medical opinions etc. by either the WCB, the injured worker or a representative, before entering into any one of these appeal stages. Delays lead to lapses in personal memories of facts and witness statements as well as a lack of expeditious medical treatment. It also fosters mistrust and poor industrial relations with employers, significant decline in finances, and increased distrust in the workers' compensation system.

In reviewing the OWA's past three COR submissions and the subsequent actions that were taken, it is disappointing to note that none of the COR recommendations put forth to attempt to address this very important issue were implemented. Having said that, effective August 2015, the newly appointed Board has exercised it authority under Section 18(2): "The Board may delegate any of its powers or functions to any of its employees." Specifically, the Board Appeal Tribunal has staffed and authorized an appeals commissioner to amend or overturn decisions being appealed when the change is in favor of the appellant. The addition of this position is having a positive impact as it is assisting the Tribunal in reducing the current backlog status.

To be clear, this current appeals commissioner position is not what the OWA is intending in its second recommendation. Rather, the intent of our recommendation for an appeals commissioner is in alignment with the 2001 COR Report recommendation (page 23 – include addition of a full-time Appeals Commissioner as a member of the Board), as well as the 2006 COR recommendation 8.06, and the 2010 COR recommendation 24 (addition of two full-time members be appointed).

A made-in-Saskatchewan hybrid model that would maintain the current internal governance/tribunal structure would contribute to alleviating the lengthy backlog of appeals at the tribunal level by providing the necessary staff levels identified by previous COR reports. In the Saskatchewan Ombudsman's 2007 report titled Hearing Back: Piecing together Timeliness in Saskatchewan's Administrative Tribunals, Recommendation #14 stated: "Government, in consultation with tribunals, ensures the number of members and the mix of full-time and part-time staff is appropriate for the tribunal's caseload and mandate."

This made-in-Saskatchewan internal model would also serve to avoid the potential issues that would come from establishing a separate external appeal tribunal.

The OWA hosted the annual general meeting of the Canadian Association of Workers Advisors and Advocates (CAWAA) in September 2012. This is the group of directors and managers of the Worker Advisor or Advocate offices across Canada. The group heard from the Saskatchewan Board Appeal Tribunal who presented on its unique two-fold role, how they manage their dual responsibilities, etc. After the presentation, this CAWAA group provided comments; some of which are reflected below:

- Does not create the same litigious style hearings which are occurring in other provinces;
- Three-person panel minimizes unrecognized pre-conceptions/prejudices;
- Inquiry based and non-adversarial;
- Usable by self-represented workers as truly inquiry based;
- In dual role, able to learn from appeal outcomes.

The Nova Scotia Chief Worker Adviser in his Annual Report (March 31, 2014) notes the following:

> *As I reported in previous years, the litigious and adversarial nature of the workers' compensation appeal process continues to be a significant factor…,contributing to delays in dealing with appeals. This matter continues to be the subject of discussion among stakeholders in the workers' compensation system.*

Justice William J. Vancise observed that tribunals "were created to avoid the rigidity of the judicial system, described as too formal and procedurally dominated; too costly because it requires the parties to retain legal counsel; unable to adapt the current adversarial model to render expeditious dispositions; unable to handle a high volume of cases; and lacking expertise in relations to public policy in matters such as labour relations." He goes on to note, however, "many of those criticisms can now be leveled at administrative tribunals."

The OWA fully endorses the current made-in-Saskatchewan internal WCB tribunal format that continues to utilize a less formal, more flexible non-adversarial inquiry model. The specific WCB member accountabilities (to mirror the language in the Saskatchewan WCB Governance Policy) of a full-time appeals commissioner whose appointment would be as an additional member of the WCB would be to provide the leadership and oversight to ensure the WCB Tribunal adheres to the rules of natural justice.

Section 48 states: "If the Board is unable to determine an issue in favour of the person claiming compensation, it shall provide that person with written reasons for its decision. WCB Policy (POL 22/2013) Appeals – Board Appeal Tribunal identifies in point 9 that" …the Board Members will provide a written decision to all interested parties including detailed reasons for the decision.

Ombudsman Saskatchewan developed a *Practice Essentials for Administrative Tribunals* guide that supports producing well-reasoned decisions that provides parties with sufficient reasons for the decision. The *Model Code of Administrative Procedure For Saskatchewan Administrative Tribunals* (November 2006) notes that "…the law does not require tribunals to give reasons for their decisions in all cases, most tribunals now accept that the participants are entitled to reasons. The trend in the courts is to encourage tribunals to include reasons in their written decisions."

The written reasons provided in decisions inform not only the appellant that they have been heard and that all evidence has been weighed and considered, but also serves to:

- Inform representatives of the deliberations for consideration of obtaining 'new' evidence and/or consideration for other venues such as Medical Review Panel or Judicial Review;
- Inform operations staff and Appeals Department of reasons their original decision was overturned; potential to influence other like-claims from having to go through appeal process;
- Inform organization of potential policy clarification, staff training needs, etc.; and
- Guards against arbitrary decisions as reasons ensure the resulting decision has been fully thought through; answers the 'why'.

In addition to providing written reasons in all decisions, the OWA, recommends that the WCB publish tribunal decisions. The publication of the tribunal decisions would provide a level of transparency and communication to all stakeholders and confirm the integrity of the current internal WCB Tribunal model. As per policy **Appeals – Board Appeal Tribunal (POL 22/2013)** the Board Appeal Tribunal "…will consider any appeal on its true merits and justice in accordance with the provisions of the Act, policies and the rules of natural justice…" (Policy 7).

There is a three-person board consisting of a chairperson and two board members, one of whom represents employers and one of whom represents workers. It is our experience that WCB Appeal Tribunal decisions do reflect that they are adhering to the fundamental principles of administrative justice noted above. Publication of the tribunal decisions, albeit edited versions that protect the privacy of parties to the proceedings, would allow for the review of the decisions by interested parties to inform that due diligence and consideration has been extended fairly and reasonably in determining appeal outcomes. This would also help stakeholders to have a better understanding of the rationale given for all tribunal appeal decisions. To date, several other jurisdictions across the country publish their decisions and have policies relating to how this is to be done.

The OWA considers a disciplined education in administrative tribunal matters is essential in ensuring tribunals are effective and competent. The WCB Governance Policy clearly speaks to disciplined governance education, regularly participating in programs focusing on sound governance, and board members participating in ongoing governance education. This same policy does not as clearly identify the same commitment to disciplined administrative justice education or to the regular participation in programs on sound administrative justice practices.

In the section of the Governance Policy, the board members specific accountabilities states: "2.1. Governance Responsibilities 2.1.11. Participate in ongoing governance education." In this same section of specific accountabilities the same cannot be said in 2.7. Appeals to the Board where there is no mention of education at all. Education and ongoing education in administrative justice is crucial in assuring sound processes, effectiveness and continuous improvement in administrative justice practices.

The Foundation of Administrative Justice (FOAJ) is dedicated to education of the administrative tribunal community, and includes a certification program for Tribunal members. Workers' Compensation Boards across the country, and including the respective Workers' Advisors or Advocate's offices, have been participating in and completing their respective certifications. By participating in the FOAJ education program, it provides participants with a common language and mutual understanding of administrative fairness, natural justice and best practices. Two other tools previously noted were the *Practice Essentials for Administrative Tribunals* best practices guide (designed by Ombudsman SK) and the *Model Code of Administrative Procedure For Saskatchewan Administrative Tribunals* (prepared by Law Reform Commission of SK).

Saskatchewan has a relatively newly formed Saskatchewan Administrative Tribunals Association (SATA) with a membership that includes tribunal members from many of the numerous tribunals in the province as well as other members who are part of the

administrative justice community. The Council of Canadian Administrative Tribunals (CCAT) is a national organization that is also dedicated to promoting excellence in administrative justice. Both SATA and CCAT provide a forum for discussion, education research and policy development in the field of administrative justice.

It has been our experience that the chairperson and the board members of the WCB have been committed to and have participated in ongoing education in administrative justice. We feel this exemplary practice and commitment to excellence in their administrative justice role should be reflected in the Governance Policy.

Conclusion:

Both past and present chairpersons and board members have been and continue to be fully invested in their role as the Board Appeal Tribunal. No one has been happy with the long delays appellants have endured while waiting for their decisions which have significant consequences - financially, physically and emotionally. A made-in-Saskatchewan internal tribunal model that dedicates the necessary resources to carry out both the governance and appeal responsibilities is, we believe, the best solution. Once an Appeal Tribunal goes externally, there is no moving it back in, and the cost of going externally coupled with a resulting litigious, more adversarial model should be the choice of last resort. The recommendations on this issue provide the resources, transparency and accountability that would provide a cost-effective and workable compromise that meets the needs of workers, employers and representatives. More importantly, we believe these recommendations are in keeping with the true principles of the Meredith Report that is the foundation of the workers' compensation system in Canada.

Issue: Non Acceptance of Medical Review Panel Certificate

Issue Description:

As per the WCB 2014 Stakeholders Report, there are only a small number of workers attempting to access the final level of appeal, Medical Review Panel (MRP). Of those who are submitting the required certificates, most are denied by the Board Appeal Tribunal (BAT).

Recommendations

- **That the Board Appeal Tribunal provide injured workers information regarding the requirements for accessing the MRP when they receive decisions from the Tribunal that limits and/or ends their benefits.**
- **That the Board's Medical Consultant contact the worker's doctor or chiropractor to provide guidance when an enabling certificate is considered invalid by Tribunal.**

Background:

Section 60 of *The Workers' Compensation Act, 2013*, defines how an MRP is requested, who sits on an MRP and how an MRP operates. Only an injured worker can request an MRP and only after all avenues of the WCB internal appeals process have been exhausted.

Section 59(3) of the Act directs that "a written request pursuant to this section must be accompanied by a certificate of a physician or chiropractor that:

a) States that, in his or her opinion, there is a genuine medical question to be determined;

b) Sets out the aspects of the WCB's determination of the medical question that the physician or chiropractor disagrees with; and

c) Provides sufficient particulars of the question to define the matter at issue."

Upon receiving the request and certificate, the BAT will determine if the legislated requirements of Section 59(1), 59(2), and 59(3) of the Act have been met.

The WCB Board Appeals Tribunal determines whether the enabling certificate meets the criteria required to access an MRP. Upon review of the WCB 2014 Stakeholder Report, we note the following: there are very few MRP requests submitted and of those submitted, almost all are denied.

WCB 2014 Annual Report	2014	2013	2012	2011	2010
Certificates Accepted	1	3	6	3	5
Certificates Denied	13	10	13	13	6
Cases Withdrawn	0	1	1	0	0
Total	**14**	**14**	**20**	**19**	**11**

When physicians have contacted our office for assistance with MRP requests, we note that physicians who have attempted to provide the medical certificate on their own have been told that:

a) They have not identified a genuine medical question;

b) They have not provided sufficient particulars;

c) They have not provided new medical evidence;

d) The WCB has not made a decision on the specific issue they have identified; or

e) The doctor has not stated why she disagrees with the WCB's decision.

It is clear from the WCB MRP statistics that few clients are attempting to access this final appeal level, and those whose physicians or chiropractors do attempt to complete the necessary paperwork are often denied by the Tribunal. Doctors and chiropractors, who then attempt to re-submit the request as per the requirements set out in the Act are often unsuccessful, leaving the medical practitioners frustrated.

In cases where the certificate is not accepted, the BAT should refer the file to the Board's Medical Consultant to reach out to the treating care provider and assist the medical practitioner with what is required with respect to completion of the Certificate. This practice would replace the current one noted in the WCB MRP Fact Sheet where the physician is directed to reach out to the Board's Medical Consultant.

Further to this, it would be beneficial for the WCB to create and provide an MRP form letter to injured workers advising them of the right to this final level of appeal when appropriate. This information along with the WCB MRP Fact Sheet would be helpful for the injured worker and their physician.

Conclusion:

It is our experience when discussing the option of MRP with clients that several injured workers have not accessed the MRP because they are not aware of it or have had their medical enabling certificates rejected because they were not completed accurately. The statistics show that of the number of injured workers who actually access the MRP, only a few are accepted. Therefore, we believe that the WCB should inform those appellants that the BAT has denied their appeal and there is a medical question about the MRP process. Additionally, in cases where the Medical Enabling Certificates are invalid or not completed accurately, it should be the WCB that reaches out to the worker's physician to provide guidance.

Issue: Board Appeal Tribunal – Appellants Denied Access to All Appeal Levels

Issue Description:

Since the Board Appeal Tribunal has full authority to review all matters on a claim file, they can reconsider every decision previously made and are not required to uphold prior decisions if they believe them to be incorrect. When the Tribunal utilizes this authority on issues other than those the appellant requested for appeal consideration, the reversal decision at this level of appeal deprives the appellant access to the full appeal process and does not allow for the appellant to know the case they must respond to prior to the decision being rendered.

Recommendation:

- **At such time that the Board Appeal Tribunal is reviewing an appellant's claim decision and in that review identifies prior decisions they deem to potentially be incorrect, those prior decisions be returned to Operations with the Tribunal directing further development be undertaken.**

Background:

The intent of the appeals process is to provide workers and employers with a four-level process for appealing claim decisions. This is to provide an easily accessible and independent process of review. The final level in this appeal process is a review by the Board Appeal Tribunal (BAT), except in cases where there is a valid medical question and a request is made for a Medical Review Panel (MRP).

When the BAT rules on issues other than those appealed by workers, the workers are deprived of access to all levels of the independent appeal process that would have been afforded to them had the decision been made originally on their claim. Furthermore, if the BAT decision results in overturning the initial decision to accept the claim, the worker is left with absolutely no recourse and no access to an MRP.

Policy Appeals – Board Appeal Tribunal (POL 22/2013) point 7 of the Policy section states: "…(the BAT) will consider any appeal on its true merits and justice in accordance with the provisions of the Act, policies and the rules of natural justice, which require the decision maker to: c. Give each party an opportunity to state their case. d. Give each party an opportunity to know the case that they must respond to…"

The policy also states: "…the Board Appeal Tribunal…**will** consider any appeal on…the rules of natural justice,…" While the BAT is not bound by policy, this statement governs their appeal process expectations and as such it is important to note that it does not state '**may**' it states '**will**'; it is a commitment to adhere to these basic principles of fairness and natural justice.

The OWA has seen an increase in cases where the BAT is ruling on issue(s) that were not under appeal, where the BAT decision has been negative for the appellant, and where the party did not have an opportunity to state their case nor have an opportunity to know they

must respond to the case. Some of these cases involved the OWA from the onset of the appeal. No contact was made to inform the advocate that other issues were being explored that would have afforded the advocate time to review the newly identified issues and prepare to address them. There are also a number of workers who were blind-sided and came to the OWA after other aspects of their cases were examined by the BAT that resulted in a negative decision with significant implications for the client.

This practice compromises the important principle that an individual has a right to due process and a fair hearing. Many of these occurrences did not involve a hearing and when there may have been a hearing scheduled, the hearing had been requested by the appellant or their representative regarding the appeal submission. This leaves the parties being questioned by the BAT on issues they were not aware of and therefore unprepared to speak to the case against them.

A significant issue with the lack of due process and fairness with this practice is that many of the claims we see reversed by the BAT are long-standing accepted claims that go back a number of years. Section 23 of the Act clearly legislates that decisions are to be made on the real merits and justice of each case and that if the evidence in support of an issue is approximately equal the decision shall be resolved in favour of the worker. At the time of the BAT's review of the appellant's appeal, the prior decision the BAT is now also reviewing as potentially incorrect was often made several years prior. It is nearly impossible to respond to this type of case whether one is an experienced advocate and even more so if it is a self-represented individual. With the passage of many years on an accepted claim, it is hard for any of the parties of these issues to respond to queries as to particulars and/or intent of meaning from many years prior.

The BAT does offer that it will reconsider a decision they have rendered if 'new evidence' is presented. While that does sound 'fair', it is important to note that once a decision is made the threshold of what would be considered 'new evidence' is quite considerable. While that alone may not seem unreasonable, it is the lack of due process preceding this possibility that makes it unfair.

Claim example:

1. A client appealed his suspension of benefits. This issue was resolved/reconsidered by Operations prior to the BAT's review of the case. Instead of withdrawing the appeal, as the matter was already dealt with and there was no longer an issue under appeal, the BAT proceeded to review the case and overturned the entire acceptance of the claim. In addition, no hearing was arranged for this worker to speak to the issue, as he was not aware this was occurring.

   This example illustrates how the board members' practice of making decisions on issues other than those appealed by the worker result in the worker's loss of the normal avenues of appeal and/or the right to a fair hearing. The advocate gathered additional new information (this is the only way the BAT would agree to hear the case again) and the client was afforded a hearing, however BAT still limited its responsibility to a strain injury.

Conclusion:

There are significant implications for injured workers when the BAT reverses prior decisions made on their claim files. When decisions are made by the BAT on issue(s) appellants are unaware are even under review, this deprives the injured workers of their right to the full appeal process. By returning such cases to operations with direction for further development, this then provides the worker access to all levels of the appeal process with respect to a decision.

Summary of Recommendations

Calculation of Average Weekly Earnings (Section 70)

- That the WCB calculates average weekly earnings as set out in Section 70(1) and only apply Section 70(4) when an injured worker was not available for employment the preceding 52 weeks.

No Explanation Provided for Calculation of Wage Loss Entitlements

- That the WCB provide a detailed letter clearly explaining the rationale for initial calculation of wage loss benefits.
- Additionally, that the WCB provide written explanations to the worker should a worker's wage loss change during the length of the claim to ensure information being used is accurate.

Lack of Complete Development of Claims in the Claims Entitlement Services Unit

- That the WCB's adjudicative staff complete a thorough investigation, which includes contact with the injured worker before the decision is made to accept or deny a claim.
- That the WCB provide detailed decision letters that clearly explain the rationale for its ruling.

No Framework for Stakeholder Engagement in Policy Development

- That the WCB commit to a policy development framework that provides for appropriate consultation with stakeholders and create a Stakeholder Consultation Policy.
- That the WCB includes the OWA in this consultative process.

Post-Traumatic Stress Disorder Currently not in WCB Psychological Injury Policy

- That the Injuries – Psychological (POL 01/2009) be amended to include Post-Traumatic Stress Disorder as a third category of injury, including the definition and criteria provisions for acceptance of this disorder

Injured Workers Subject to Layoff While on Return to Work Program

- That the Board support injured workers impacted by layoffs subsequent to their return to work in accommodated duties. This can be accomplished by resuming the longstanding practice called for by the previous Board Policy on this subject (07/96).

Board Appeal Tribunal - Internal vs External

- Maintain the current internal Tribunal.
- Appoint a full-time Appeals Commissioner as one of the members of the Board; whose role will solely be to provide independence and accountability for the internal appeal process and whose role would not include Governance.
- Amend Section 48 of the Act to specify that written reasons be provided on all decisions.
- That the Tribunal publishes appeal decisions on the WCB's website to promote transparency and accountability.
- Amend the WCB Governance Policy to incorporate into the Governance Framework that all board members regularly participate in programs focusing on sound administrative tribunal practices.

Non-Acceptance of Medical Review Panel Certificate

- That the Board Appeal Tribunal provide injured workers information regarding the requirements for accessing the MRP when they receive decisions from the Tribunal that limits and/or ends their benefits.
- That the Board's Medical Consultant contact the worker's doctor or chiropractor to provide guidance when an enabling certificate is considered invalid by Tribunal.

Board Appeal Tribunal – Appellants Denied Access to All Appeal Levels

- At such time that the Board Appeal Tribunal is reviewing an appellant's claim decision and in that review identifies prior decisions they deem to potentially be incorrect, those prior decisions be returned to Operations with the Tribunal directing further development be undertaken.

Workers' Compensation Act Committee of Review 2015

Recommendations of the Office of the Workers' Advocate

November 2015

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

300 - 1870 Albert Street
REGINA SK S4P 4W1

Telephone: 1-877-787-2456

Government of Saskatchewan