



Submission to the Alberta Workers' Compensation Board Review  
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18004-107 Avenue NW  
Edmonton, AB T5S 2J5  
t:780.455.1122/f:451.2152  
www.albertaconstruction.net  
info@albertaconstruction.net

List of ACA Recommendations:

1. ACA recommends the Board recruitment process be lengthened so that employer associations are given sufficient time to recruit candidates for consideration.
2. ACA recommends that employer reps be involved in the recruitment interviews as is currently the case with the Appeals Commission.
3. ACA recommends the current WCB Corporate Governance policy be revised to oblige that all nine of the WCB Directors meet regularly with broad stakeholder groups such as the Industry Task Force (for employers) and the Labour Coalition (for labour).
4. ACA recommends the establishment of an independent Employer Appeals Office, within the Ministry of Labour, funded through an allocation of WCB premiums.
5. ACA recommends separating the Office of (worker) Appeals Advisor from the WCB, and improving the competency of these individuals.
6. ACA recommends repetitive strain injuries for older workers be treated as an occupational illness similar to hearing loss (that is, the costs be borne by the industry group as a whole rather than an individual employer).
7. ACA recommends the WCB Act should be amended to enshrine the principle that no-fault does not extend to post-incident behavior that in effect removes the worker from the course of employment and hence entitlement to disability benefits.
8. ACA recommends that the WCB formalize the use of in-person multistakeholder consultation, where the anticipated change will incur costs above a threshold, for example, where costs impacting those most affected by the change are going to increase by more than 5%.
9. ACA recommends specific policies should be identified and cited for all decisions made on claims.
10. ACA recommends that the WCB confirm the range required to maintain actuarial soundness, and then operate within that range.
11. ACA recommends that the claim be automatically assigned to the camp operator when the operator is determined to be negligent, and otherwise be assigned to the industry group rather than the individual contractor.
12. ACA recommends amending the Act to eliminate the potential for litigation for owner operators where they choose to forego personal coverage, as long as their corporation has coverage.



The Alberta Construction Association welcomes the opportunity to provide input to the review of the Alberta Workers' Compensation Board. Alberta's construction industry employs approximately one in ten working Albertans and contributes approximately 25% of WCB premiums (Source: WCB). With 3000 member firms across Alberta, from small entrepreneurs to multinationals, union and non-union, serving all segments of the construction market, Alberta Construction Association represents the collective voice of Alberta's non-residential construction industry.

While interprovincial comparisons need to be scrutinized to ensure comparing "apples to apples", Alberta's stakeholders can be justifiably proud in establishing one of the best workers' compensation systems in Canada in terms of striking the right balance between workers and employers to ensure fair compensation, meaningful rehabilitation for an injured worker, and a sustainable and affordable workers' compensation system:

- The second highest 2016 maximum compensation earnings (at \$98,700) and the highest percentage of earnings benefits are based on (at 90%), combined with the lowest 2016 average assessment rate at \$1.01 (Source: Association of Workers' Compensation Boards of Canada, 2016). The current cap of \$98,700 net earnings is far higher than Alberta's average gross wage of \$58,000. The WCB Alberta formula provides for a cost of living adjustment to ensure the MIE covers the full wage of 90 percent of workers covered in the province.
- High levels of worker satisfaction with the fairness of WCB decisions (80.7% for 2011, 84.3% for 2012, statistic reporting changed for 2013 and 2014) (Source: Workers Compensation Board of Alberta, Annual Reports)
- More than 93% of injured workers achieved the fitness needed to return to work (Source: Workers Compensation Board of Alberta, 2013, 2014 Annual Reports)
- More than 80% of injured workers who used vocational services able to earn 75% or more of their pre-accident earnings (Source: Workers Compensation Board of Alberta, 2013, 2014 Annual Reports)
- A more than fully funded system, ensuring funds available to pay the future costs of current and prior-year claims

ACA's comments on specific items identified in the Review Terms of Reference:

## **Governance**

### Board of Directors

ACA believes that the number and representation of the Board is appropriate (3 representing each of workers, employers, and the public). While the minutes of the meetings of the WCB Board of Directors are accessible on the WCB website, they contain little detailed information, limiting transparency. Currently, stakeholder confidence in the WCB governance is undermined because there is very limited accessibility to WCB Directors, and there is no obligation for them to communicate with stakeholders. **1. ACA recommends the Board recruitment process be lengthened so that employer associations are given sufficient time to recruit candidates for consideration. 2. ACA recommends that employer reps be involved in the recruitment interviews as is currently the case with the Appeals Commission. 3. ACA recommends the current WCB Corporate Governance policy be revised to oblige that all nine of the WCB Directors meet regularly with broad stakeholder groups such as the Industry Task Force (for employers) and the Labour Coalition (for labour).**



### Independence

ACA believes that the WCB should remain arms-length from Government to work effectively. Further, the WCB should be distinct from governance and operations of both appeals and prevention. Principles of natural justice are strengthened when the review of appeals is independent of the body that made the original decision regarding the claim. The majority of workers compensation Boards across Canada operate separately from prevention programs. The WCB fulfills a distinct role, under separate legislation, from that of Occupational Health and Safety, Alberta Labour (OHS). WCB's current linkages to prevention via premium structure and allocation are appropriate, namely:

- A portion of employer WCB premiums fund OHS programming
- A portion of employer WCB premiums support funded safety associations, and
- Individual employer safety performance is incented through the Partners in Injury (PIR) program.

### Safety associations

Alberta Construction Association strongly supports the continued funding of the Alberta Construction Safety Association through WCB premium levies. The levy approach ensures that all employers contribute financially to a consistent standard of construction safety education, training, and audit programs. The current oversight by Boards of Directors comprised of employers and other stakeholders is appropriate. WCB should continue to periodically confirm employer support to fund the safety associations.

### Data

ACA is concerned by the use of claims data as one of the key measures to drive prevention. WCB data was meant for insurance purposes and not safety data/performance. Further, because construction employers' ability to win bids can be heavily influenced by their safety record, a perverse outcome of Government publication of employer safety records could be to reduce the desire to report all incidents, even those with no time lost and very low severity. ACA supports efforts by OHS to work with industry to develop leading indicators that correlate with a demonstrated reduction in injuries.

As noted previously, jurisdictions utilize differing definitions for similar measures, making comparisons difficult. In some Atlantic provinces (for example), there is a waiting period of 3-5 days for claims before they become lost time claims. So while Alberta's WCB considers any claim with a replacement of worker wages to be a lost time claim, Atlantic WCBs would not have any 1-2 day claims, where in Alberta we would. There is no opportunity to adjust for that type of nuance in the data. In turn, the data is comparable only given those types of factors. There is not a list which would identify the nuances for each board. Further, without access to the actuarial assumptions, jurisdictional comparisons are incomplete.

### **Appellate Structure and Effectiveness**

Employer satisfaction with the fairness of WCB claims decisions has consistently been far less than the satisfaction of workers (68.5% vs. 81.2% in 2010, 71.3% vs. 80.7% in 2011, and 65.8% vs. 84.3% in 2012, not reported separately thereafter) (Source: Workers Compensation Board of Alberta Annual Reports).

As stated earlier, ACA supports the Appeals Commission operating independently of the WCB. ACA applauds the transparency of the publication of Commission decisions on the Can LII website. The Commission is to be further commended for inviting employers to serve as one representative on panels interviewing prospective Commissioners, and for periodically meeting with stakeholder groups such as the Industry Task Force to explain performance and use of the funds provided via an allocation from WCB levies. The Commission is to be



commended for a performance focus on timeliness of the appeals process, although ACA acknowledges that appeals timelines are impacted by the submission of information from appellants and respondents. The ACA would not support the Appeals Commission having the ability to examine issues that are not the subject matter of the appeal.

#### Office of Appeals Advisor

Alberta Construction Association believes the Office of the Appeals Advisor, acting solely as an advocate for the worker, is inherently unfair. Approximately half of Alberta construction employers have 20 employees or less (Source: Alberta Labour, 2014). The presumption by the WCB that all employers have the knowledge and resources to effectively participate in the Appeals process through the Appeals Commission is inconsistent with the principles of natural justice.

The provinces of BC, Ontario, and Prince Edward Island provide employer appeals advisors independent of the WCB. The BC Office mandate is instructive:

“Employers’ Advisers provide independent advice, assistance, representation and education to employers, potential employers and employer associations concerning workers’ compensation issues under section 94 of the Workers Compensation Act. In fulfilling this mandate, Employers’ Advisers:

- Assist and advise employers, potential employers, and employer associations in understanding, working and complying with WorkSafeBC issues in Claims, Assessments and Prevention.
- Respond to inquiries about workers' compensation legislation, decisions, appeals and related matters in Claims, Assessments and Prevention.
- Prepare submissions on behalf of employers to WorkSafeBC, Review Division, Workers' Compensation Appeal Tribunal (WCAT) and assist employers in cases involving complex legal, medical or policy issues.
- Conduct seminars and public speaking engagements on occupational health and safety issues, prevention, claims management, assessments and appeals.
- Consult with WorkSafeBC officials to review and make recommendations to the Policy Department, Executive and Board of Directors.
- This service is available to all employers or potential employers free of charge.”

**4. ACA recommends the establishment of an independent Employer Appeals Office, within the Ministry of Labour, funded through an allocation of WCB premiums.**

**5. ACA recommends separating the Office of (worker) Appeals Advisor from the WCB, and improving the competency of these individuals.** Implementing this recommendation will go a long way to addressing worker concerns about bias and insufficient representation. Individuals should certainly remain free to seek assistance elsewhere, but if they access services outside of the Office of Appeals Advisor, they should be required to pay for them on their own (no legal aid), otherwise, implementing the recommendation would send a contradictory message to workers (i.e. here are the high quality services we are offering, but they may not be good enough so we will also pay for you to get external assistance).



## Principles of Compensation

The Alberta Construction Association believes that the Alberta WCB has proven to be an effective and fair insurer of claims arising from occupational injury, in the provision of meaningful rehabilitation, and in the provision of economic loss where rehabilitation to return to previous income is not possible.

### Presumptive Disease

ACA does not support any expansion of presumptive diseases. Implementation of presumptive diseases coverage contradicts the fundamental tenets and responsibilities of the WCB to make decisions based on evidence, policy, and a fair, impartial and transparent process.

### Mental health

With respect to mental health, a significant challenge is how to determine pre-existing non-occupational condition versus a workplace injury. Further, interpersonal conflict with supervisors or coworkers can pose as depression or anxiety, but are not in themselves reasons to certify workplace injury claims. The WCB needs to be able to clearly define the incident time, date of occurrence and employee reporting of the occurrence before randomly accepting a claim as a workplace incident. As with all other claims, there has to be a clearly defined incident. Very clear parameters and clear and unequivocal cause/effect relationships between work and the mental/emotional illness must continue to be shown. Mental health diagnosis reveals little about the degree of impairment. The worker has an obligation to report the incident and the facility has an obligation to provide the necessary care including reassigning the worker to other duties to protect from an accumulative injury. Mental/cognitive/emotional illness MUST be treated the same way. Non-work-related personal barriers should always be serviced by other government and social services, not WCB.

### Repetitive strains

**6. ACA recommends repetitive strain injuries for older workers be treated as an occupational illness similar to hearing loss (that is, the costs be borne by the industry group as a whole rather than an individual employer).** Construction workers accumulate wear and tear through their career with a number of employers. Placing all the costs on the current employer may provide a disincentive to employing these experienced and skilled workers.

The current funding model provides appropriate measures to ensure individual (experience rating, Partners in Injury Reduction) and collective (industry rate groups) employer accountability to ensure the Board provides high levels of benefits while maintaining long term actuarial sustainability. ACA supports the refunds of employer premiums that arise from investment activities that outperform that required for coverage of current and future claims costs (and WCB administration). Ties to prevention through the funding mechanism (PIR, funding of safety associations, funding of OHS) are appropriate. Return to work programs have beneficial effects on worker health (Institute for Work & Health) and to support injured workers attachment to the labour force (Source: Workers Compensation Board of Alberta Annual Reports).

There are several additional principles of compensation that ACA recommends be addressed:

1. Clarify that the application of no-fault is limited to the initial incident.
2. Maintaining cap on maximum insurable earnings

### No-fault limited to initial incident

With no change in the wording of the relevant policy, the WCB informed employers in 2013 that the WCB adjudication would not be affected by employment relations, in effect, extending the no-fault principle to situations where workers on modified duties had been terminated for cause. The Appeals Commission subsequently overturned the WCB's decision to provide benefits in a number of appeals. ACA doubts that Justice Meredith considered modified duties over one hundred years ago as he formulated the principles of workers compensation. If the Review truly wants to ensure that the WCB's principles of compensation promote prevention and workplace safety, the WCB should accept that the actions of the worker post-incident can indeed remove the worker from the course of employment and from entitlement to disability benefits. A thorough analysis is contained in Attachment A, prepared by McLennan Ross. **7. ACA recommends the WCB Act should be amended to enshrine the principle that no-fault does not extend to post-incident behavior that in effect removes the worker from the course of employment and hence entitlement to disability benefits.** Workers continue to have the right to pursue unjust ruminations through Human Rights legislation, and WCB benefits can be reinstated should Human Rights find the termination was without cause.

### Maintaining cap on Maximum Insurable earnings

The current cap of 90% of net pre-incident earnings up to \$98,700 net earnings is far higher than Alberta's average gross wage of \$58,000. The WCB Alberta formula provides for a cost of living adjustment to ensure the MIE covers the full wage of 90 percent of workers covered in the province. Raising maximum insurable earnings risks providing a disincentive to return to work. The number of injuries of those individuals making in excess of the MIE would be, by WCB data, be relatively low. However, the amount of premiums collected by the WCB, if there were no MIE cap, would increase an already inflated green zone.

### **Policies Including Implementation**

The WCB is to be commended for a clear and consistent focus on alignment of goals, strategies, performance measures and communication. WCB reports are a model of clarity that provides stakeholders relevant and concise information on achievement in the core goals of:

- Commitment to decision fairness (with the previously noted concern that some of the data no longer provide as much clarity as in previous years)
- Focus on safe return to work
- Leveraging prevention, and
- Financial stability

ACA encourages periodic reviews of the Corporate Scorecard to ensure they support these goals.

### Policy development process

The WCB's current policy development process includes: advance publication of policies to be reviewed for the coming year, and, usually online review of draft policies. **8. ACA recommends that the WCB formalize the use of in-person multistakeholder consultation, where the anticipated change will incur costs above a threshold, for example, where costs impacting those most affected by the change are going to increase by more than 5%.**

Previous consultations where multiple stakeholders were involved created the opportunities to share perspectives and increase stakeholder understanding of the potential impacts of the change. Many ACA employers operate in more than one province, and are able to share approaches to the same policy issue that are employed elsewhere.





### WCB decision writing

WCB decision writing has declined in the past year. WCB decision makers are not quoting applicable legislation and policies. WCB decision makers are also not citing all evidence considered. In some cases, the employer has not even received a written decision. **9. ACA recommends specific policies should be identified and cited for all decisions made on claims.**

### Privacy

Existing provisions in legislation and policy adequately protect worker right to privacy. There are provisions within the FOIP process that safeguard right to privacy as well as allow for disclosure of allowable information. The WCB has a mandate to follow relevant legislation, and emphasis should be placed on ensuring that requirements are met rather than introducing new or additional requirements. Employers have a duty to accommodate and it is imperative they be able to have timely and sufficient access to WCB files in order to better understand how employee's disabilities can be accommodated. Insufficient access compromises employers' ability to manage claims and represent themselves in appeals, in turn impacting WCB experience rating, PIR, and rate setting programs.

### Claims suppression

Employers are already being held to a high standard through various pieces of legislation that make claim reporting a priority issue. ACA has seen no evidence of claims suppression, and with the reporting mechanisms in place (independent reporting from the worker, physician and employer) we do not see that the experience rating system is, or should be, a factor in claims suppression. We have seen no evidence of a direct link between the experience rating system and alleged claim suppression. Studies in other jurisdictions have looked at claim suppression and noted that there are many contributing factors to non-reporting by the worker or the employer. To characterize keeping a worker on full pay as claim suppression as has been done in some jurisdictions is not accurate. This is often a benefit that has been negotiated by unions for their members. What has been noted by WCB Alberta is that actual or deliberate claim suppression is much less of an issue than employer misunderstanding regarding the types of issues that need to be reported, in particular the need to report no lost time/disabling injury cases.

WCB Alberta has reported they have not had reason to take significant corrective action (levy fines, institute PIR holds, etc.) with an employer related to claim suppression in recent memory. Until it is demonstrated that this is an issue ACA does not see any need to change investigative or penalty processes. Furthermore, the effectiveness of a penalty process within the workers compensation system is questionable. The financial benefits of effectively managing the cost of claims is a much stronger motivating factor than penalties.

There are several policy areas that ACA recommends be addressed:

1. Clarify application of the "Green Zone" funding policy
2. Clarify which employer is responsible for the claims for "captive workers"
3. Eliminating potential for litigation

### Green zone

Employers support the need to ensure the WCB remains fully funded to account for current and future claims costs. The WCB funding policy established a "Green Zone" of 114-128% of fully funded to allow for fluctuations in market returns over time without having to dramatically adjust premiums year to year. Employers understood that return of premiums surplus to maintenance of a fully funded position would be triggered once the funded position exceeded 128%, the upper end of the Green Zone. In practice, the WCB has operated for years above the 128% threshold, in effect, raising the upper threshold in apparent contravention of its own policy. The return of



premiums surplus to the funding requirements would allow employers to reinvest these funds in maintaining and creating jobs for Albertans. The size of the funding discrepancy is not trivial (for example, the difference between 136% and 128% is \$70M). **10. ACA recommends that the WCB confirm the range required to maintain actuarial soundness, and then operate within that range.**

#### Captive workers

Contractors undertaking work in remote locations frequently must accommodate their workers in camps designated by the purchaser of the construction service (the owner). These camps are owned and operated by the owner or a third party which contracts with the owner. Claims arising from ingress or egress incidents in a camp (eg. Injury arising from slipping on ice) where the employee is beyond the supervision of the employer are invariably assigned to the contractor. The contractor can then seek cost relief but is frequently reluctant to do so for fear of losing repeat business with the owner, should the reassignment of the claim cost impact the owner.

**11. ACA recommends that the claim be automatically assigned to the camp operator when the operator is determined to be negligent, and otherwise be assigned to the industry group rather than the individual contractor.**

#### Eliminating potential for litigation

In the construction sector, the owner operator often provides direction at the worksite. The Alberta Act conceivably allows the situation where the owner operator could still be subject to litigation even though the corporation has WCB coverage. **12. ACA recommends amending the Act to eliminate the potential for litigation for owner operators where they choose to forego personal coverage, as long as their corporation has coverage.**