



July 10th, 2019

Ms. Janet Patterson

Dear Ms. Patterson:

I am responding on behalf of COCA, which represents 20 construction associations, with members from all parts of British Columbia, from every sector and from every size of company, both union and non-union.

In this submission, COCA is commenting on the Terms of Reference (TOR) for your review. The TOR is public but we are not aware of any written report from yourself as of this date.

Upon completion, COCA requests that your report be circulated for comments from the stakeholders before any action is taken by the provincial government or WorkSafeBC.

We also would like to be part of the ongoing process and recommend that a small Advisory Committee (one worker representative, one employer representative, one government representative, with alternates) be formed to assist with this implementation.

We wish to make one point at the outset.

WorkSafeBC itself has an excellent process for the development of policy and regulation. It is one of the best anywhere.

The WorkSafeBC process encompasses an initial identification of issues from stakeholders and WSBC itself.

This is followed by research, either by experts within the Policy, Regulation & Research Division (PRRD) or by contracted external experts, or both.

Then there is pre-consultation with major organizations, further research, and formal and widespread consultation on specific written proposals. For Occupational Health & Safety Regulations, there is also a series of public hearings.

Finally, the proposed policy or regulation goes to the the WorkSafeBC Board of Directors. They may approve, modify or extend the process.

Unfortunately, the review mandated by the Minister of Labour Harry Bains does not allow time for this thorough and excellent process.

We understand the sense of urgency that may push for a short deadline, but we believe that complex issues require thoughtful analyses.

The document by the Minister initiating the review and the Terms of Reference were drafted on March 4, 2019.

The final report is to be provided to the Minister by September 30, 2019.

The majority of this time – June, July and August – is over the summer holiday period, which will interfere with interviews and consultation.

We believe that this rushed process will not permit proper examination and consultation on issues that are critical for workers (especially injured workers) and employers.

A significant part of the review process remains hidden. A review by Terry Bogyo was submitted to the WSBC Board of Directors in December, 2018. This review apparently dealt with financial matters. The provincial government has not – to date -- permitted the release of the Bogyo report.

The security and sustainability of the workers compensation system is at risk if significant financial changes are made without full analysis and input from stakeholders.

COCA has repeatedly requested a copy of the Bogyo report. So far, we have not received the report nor have we been given an estimate of when we may receive it. It is essential that stakeholders have the opportunity to read and comment on the issues and recommendations within the Bogyo report.

As a general comment, the current BC WorkSafeBC system is well managed and securely financed to ensure future payments to injured workers and their dependents.

The COCA comments that follow are therefore made only on the Terms of Reference for your assignment because that is the only substantive material we have been given.

We have divided our comments using the Revised March 4, 2019 Terms of Reference as our template. Our comments follow the sequence of the items.

The quotes below are the relevant excerpts from the TOR.

“the Minister directs that a review of the workers’ compensation system be undertaken as follows:

1. Subject to further direction from the Minister of Labour, the review will assess the following specific issues (bold face added):

(a) “The policy and practices used in the workers’ compensation system relating to supporting injured workers return to work.”

Comment: This item is important, and it has been considered many times and on an ongoing basis by the Policy, Regulation & Research Division of WorkSafeBC.

In Appendix 1 we list the consultations undertaken by the PRRD on a range of WorkSafeBC issues from the period 2016 to current.

COCA has actively participated in all of these consultations.

In our experience, the staff of WorkSafeBC strive towards continuous improvement as the workplace environment evolves.

Part of this improvement is demonstrated by the *lowest ever* Injury Rate for BC workers.

COCA supports the need for an effective vocational rehabilitation system that is focused on assisting workers to achieve medically and environmentally safe, durable and timely return to work.

We request that we be part of any follow-up process to help build this continuous improvement.

(b) “An evaluation of current WorkSafeBC policy and practices through a Gender-based Analysis Plus GBA+ lens.”

We have no objection to this item, provided that the evaluation is done in a balanced manner and placed within the context of the large number of stakeholder interactions with WorkSafeBC.

However, in the experience of our staff, there is no indication of any bias within the WorkSafeBC system towards any ethnic or gender-based group.

For example, unlike Stats Canada, there is no collection of data based on ethnicity or gender identification.

Nor have we seen any pattern of prejudice within claims, vocational rehabilitation, health and safety or other areas.

- (c) **“Modernizing WorkSafeBC’s culture to reflect a worker-centric service delivery model. This model should incorporate a best-practices, research-supported approach to managing physical and mental injuries caused by the workplace.”**

Comment: This is already being done. The Workers’ Compensation Act gives the benefit of the doubt to the worker in Section 99 of the Workers’ Compensation Act:

“If the Board is making a decision respecting the compensation or rehabilitation of a worker and the evidence supporting different findings on an issue is evenly weighted in that case, the Board must resolve that issue in a manner that favours the worker.” S.99(2)

On a day-to-day basis, there is already an extensive support system for workers.

The Workers’ Advisers office provides free advice and assistance to workers. The appeal system is well developed and also available at no cost to workers.

The worker has up to one year to file a claim, then 90 days to appeal to the Review Division under Section 96(2) of the Act, and an additional 30 days to appeal to the external Workers’ Compensation Appeal Tribunal (WCAT) under Section 240 of the Act.

The same support provisions apply for employers.

- (d) **“Recommendations dealing with issues related to the improved case management of injured workers.”**

Comment: We strongly support this item. Our staff assist our members with a wide variety of claims and vocational rehabilitation issues. While the vast majority of cases are well managed, there is definitely room for improvement in several areas.

There should be faster response from WorkSafeBC on input from stakeholders and on information requests.

In particular, there should be better coordination of return to work plans in order to effectively match the injured worker skill set with a safe, durable job.

Any retraining should be authorized only after a close analysis of the worker's abilities and skill set – and a realistic consideration of job prospects.

We wish to stress however, that these comments should be put in context. There are over 200,000 claims per year to WorkSafeBC. There are over 2 million claims that potentially remain active.

COCA is contacted by its members when things go wrong (and not when all goes well), so we see a sample made up of problems and missed opportunities.

We suggest that worker advocates see a similar skewed sample.

Therefore any recommendations from this review should be carefully considered to ensure that the results will be positive.

One issue that may be raised by worker advocates is changing the policy and/or the Act to include the “duty to accommodate”.

WorkSafeBC has written a Discussion Paper that makes a recommendation to include the “duty to accommodate” within its policy (Vocational Rehabilitation and Cost Relief).

We have serious reservations about this potential requirement.

There are circumstances -- especially within the Construction Industry – where the duty to accommodate is not workable, even potentially dangerous.

It is important to note that the duty to accommodate is not absolute.

Canadian jurisprudence and the Canadian Rights Commission have added important qualifiers to this expression.

As the BC Human Rights Clinic notes in its online site:

“WHAT IS THE DUTY TO ACCOMMODATE?”

The ‘duty to accommodate’ is a legal requirement arising out of human rights legislation and case law in Canada. Although “duty to accommodate” is not found in *the BC Human Rights Code*, a series of Supreme Court of Canada decisions confirm the duty exists and applies to all provincially regulated employers. Where a barrier exists, or a policy or practice has adverse consequences on an individual in a protected group, the law says that the employer should reasonably accommodate that individual's difference provided

they can do so, without incurring undue hardship, or without sacrificing a *bona fide* or good faith requirement of the job.

WHAT DOES UNDUE HARDSHIP MEAN?

Courts have determined that accommodation efforts must go to the point of undue hardship. While ‘hardship’ on its own infers a degree of effort is required, the threshold as to undue hardship is actually quite high. However, once an employer reaches that point, their legal duty to accommodate may be discharged. Factors that are used by the courts to assess the threshold include: financial costs; health and safety risks; and size and flexibility of the workplace. While a successful resolution to an accommodation request will vary greatly from one employer to another, more than mere inconvenience or disruption is expected in all situations.”

(BC Human Rights Clinic. Duty to Accommodate page:
https://www.bchrc.net/duty_to_accommodate)

The Canadian Human Rights Commission also provides wording on the limits of the duty to accommodate.

“The duty to accommodate has limits. Sometimes accommodation is not possible because it would cause an organization undue hardship.”

An employer or service provider can claim undue hardship when adjustments to a policy, practice, by-law or building would cost too much, or create risks to health or safety. There is no precise legal definition of undue hardship, each situation should be assessed individually. To prove undue hardship, you will have to provide evidence as to the nature and extent of the hardship.”

(Canadian Human Rights Commission, online document headed “Employer Obligations” <https://www.chrc-ccdp.gc.ca/eng/content/employer-obligations>)

We strongly recommend that that any changes -- such as considering the “duty to accommodate” -- be accomplished through a small, working Advisory Committee.

- (e) **“What specific steps are required to increase confidence of workers and employers in the workers’ compensation system, including but not limited to the Fair Practices Office, and in other services provided by WorkSafeBC.”**

Comment: We recommend that a thoughtful consideration of fact-based evidence will achieve this purpose.

- (f) **“Whether there are any other urgent compensation issues that were not addressed in the final report to the Board of Directors of WorkSafeBC on how to manage the unappropriated balance in the Accident Fund.”**

Comment: This item needs very close and careful study.

Please see Appendix 2 for some of the reasons why any change to the management of the unappropriated balance of the Accident Fund must be treated with extreme caution.

Thank you for consulting with us.

Sincerely Yours,

A handwritten signature in black ink, appearing to be 'Dave Baspaly', with a long horizontal flourish extending to the right.

Dr. Dave Baspaly
President, COCA

Appendix 1

Issues for which WorkSafeBC has initiated and managed consultation from 2015 to 2019 to date:

- 2016-2018 WorkSafeBC Workplan.
- Assessment Payroll Policies
- Clothing Allowances for Injured Workers
- Occupational Health & Safety (OHS) Regulation
- Measurement of Earnings Loss
- Permanent Disability Evaluation Schedule
- OHS Committee Training
- 13 proposed OHS Regulation changes
- Workplace Hazardous Materials Information System (WHMIS)
- 2018-2020 WorkSafeBC Workplan
- COR Discussion Paper -- The Partners in Injury and Disability Prevention Program
- Occupational Exposure Limit Review (2016)
- OHS Guideline for storage racks
- Removing the Capitalized Value of Permanent Disability Awards from the Experience Rating Calculation
- Proposed policy on Prior Shoulder Dislocations
- Occupational Exposure Limit Review (2017)
- Part 16: Mobile Equipment & related amendments
- 2019-2021 WorkSafeBC Workplan
- Installment Model for Quarterly Reporting
- OHS Regulations 8, 20, 34 (2018)
- Permanent Disability Evaluation Schedule (2018)
- Activity-related soft tissue disorders (ASTDs) of the limbs
- Assessment Manual Changes
- Proposed changes to OHSR, Parts 8,20,21 (2019)
- Vocational Rehabilitation and Cost Relief
- Housekeeping Amendments to OHS Manual (2019)
- Merits and Justice in Decision Making
- Occupational Exposure Limit Review (2019)
- OHS Regulation Part 16
- Permanent Disability Evaluation Schedule (2019)

Appendix 2

The Workers' Compensation Board operates an Accident Fund. This Fund contains the money that is set aside to pay the past, current and anticipated future costs of workers' compensation claims. This arrangement is very similar to other insurance companies.

The Fund includes stocks, bonds and other financial instruments. The Fund also has a Set of Reserves to stabilize the Fund during economic downturns, such as occurred in 2008-2009.

The credit agencies that assess BC's credit rating include the financial status of the Accident Fund in their rating assessment.

A serious deficiency in the Fund could result in a downgraded credit rating. It would then cost the Province higher interest rates to borrow money.

Like other insurance companies, WorkSafeBC needs to set aside money to pay for the expected costs of claims into the future.

For example, a person who is injured and completely disabled from work in 2019 at age 18 will receive medical and compensation benefits for 50 or more years into the future. These claims costs could total \$2 million in current dollars.

The process of determining how much money should be set aside to meet these future costs is a complicated business.

The further these costs are projected into the future, the greater the uncertainty in predicting claim costs, returns on investments and legislative and policy changes.

For example, WorkSafeBC estimates that 63% of future payments for outstanding claims will occur 10 years or longer into the future, and 49% of future payments will occur 15 years or longer into the future.

This creates very significant uncertainty (data from WorkSafeBC 2018 Annual Report , page 133).

In addition to meeting the projected costs for all current and past claims, the Accident Fund must pay future costs for administration, and includes reserves for workplace disasters and potential costs arising from legislative changes.

The mandate of WorkSafeBC, as determined by the BC legislature, has expanded greatly over the past 40 years. There is no way of knowing what costs may accrue from future legislative changes.

This is further complicated by the need to estimate the future costs of long-latency

occupational disease claims that have already been recognized and are expected to manifest as claims in future years. In addition, there may be new conditions that are recognized as occupational disease claims in the future.

The past 40 years have seen very significant increases in both areas.

Complexity is an inherent part of the financial system and of the calculation of reserves to meet future estimated costs.

The complexity is, unfortunately, an integral part of a workers' compensation system that:

- seeks a general stability of employer assessment rates from year to year;
- as much as possible, works towards the concept that current employers should pay for the costs of current claims; and
- recognizes that the financial system is heavily impacted by the WorkSafeBC return on investments.

These investment returns (from investing employers' assessment payments) are used to subsidize the rates, so that a pattern of good returns will result in lower rates.

Conversely, years with poor or negative rates of investment returns can trigger the need for sudden and sustained assessment rate increases, unless there is a reasonable "cushion" built into the reserve system.

In the context of these important considerations, the last ten years have provided instructive examples.

WorkSafeBC's funded ratio dropped by 27% during the economic downturn of 2008-2009.

A starting point in the 100-110% funding range at the time would have left the system significantly underfunded and potentially have necessitated rate increases in response.

The strong funded position at the beginning of the 2008-2009 downturn enabled WorkSafeBC to mitigate rate pressure experienced due to rising claims costs.

We are experiencing an ongoing very volatile market that makes caution the best policy.