

# CHAPTER SEVEN: WORKERS' COMPENSATION

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## CHAPTER SEVEN: WORKERS' COMPENSATION

### I. INTRODUCTION

#### A. *Scope of This Section*

This chapter covers basic legislation and procedures. If a student has a client with a more complicated issue, the student should refer to the references and advisory officers listed in the resources section at the end of the chapter.

Readers should be careful to consult the latest version of the Board's policy manual, and may want to review the policy section of WCB's web site at [www.worksafebc.com](http://www.worksafebc.com).

#### B. *Governing Legislation, Regulations, and Referrals*

##### 1. Legislation

Workers' Compensation Act, R.S.B.C. 1996, c. 492.

Workers' Compensation Amendment Act, S.B.C. 2002, c. 56 (introduced May 13, 2002, as Bill 49 and Bill 63).

- Bill 49 substantially reduces benefits for injuries occurring on or after June 30, 2002. Changes include a reduction of the basic benefit rate, partial deduction of CPP disability benefits, greatly reduced benefits after age 65, and less flexible rules for assessing wage rates and partial disabilities. Workers injured before June 30, 2002 and whose condition has deteriorated will receive additional benefits under the old (and more generous) rules rather than the new rules.
- Bill 63 changes the entire Worker's Compensation appeal system. These changes are discussed in more detail below under **Section II.K: Claims Procedure**. In addition, this bill binds the policies of the Board of Directors on the Board and the appeal tribunals, effectively allowing the policies to be a form of subordinate legislation. These changes were implemented on March 3, 2003.

Bill 37, Skills Development and Labour Statutes Amendment Act, 4th Sess., 37th Parl., British Columbia, 2003.

- Introduced on October 8, 2003 as Bill 37. This bill substitutes a new set of rules for compensating survivors and allows "lay advocates" to represent workers or employers in appeal tribunals. There are no requirements as to the training, insurance, supervision or certification of these advocates

Administrative Tribunals Act, S.B.C. 2004, c. 45 (ATA)

- Makes significant changes to the powers of the Workers' Compensation Appeal Tribunal. These include elimination of any ability to deal with constitutional or Charter issues, an arguably tougher standard for judicial reviews, and a 60 day time limit to file a judicial review of a WCAT decision.
- Under s. 46.3(1) of the ATA, the Workers' Compensation Appeal Tribunal has no jurisdiction to apply the Human Rights Code, R.S.B.C. 1996, c. 210.

WCB Rehabilitation and Claims Services Manual – Volumes I & II

Online

at:

[www.worksafebc.com/publications/policy\\_manuals/rehabilitation\\_services\\_and\\_claims\\_manual/default.asp](http://www.worksafebc.com/publications/policy_manuals/rehabilitation_services_and_claims_manual/default.asp)

- Effective June 30, 2002, the Workers Compensation Act was amended by the Workers Compensation Amendment Act. The amendments changed the law in relation to compensation benefits for injured workers. Volume I of this Manual sets out the official WCB policy for claims filed under the former provisions. Volume II of this Manual sets out the official policy for claims filed under the current provisions. These policies are binding on the WCB itself and on the appellate bodies, and thus have the force of legislation. The Manual is often the best starting place for research on new or unfamiliar issues.

## 2. Print Resources

Heather MacDonald and Marguerite Mousseau. Workers' Compensation in British Columbia, (LexisNexis Canada, 2009)

- A comprehensive overview of the the workers' compensation system in British Columbia, written by practitioners.

## 3. Referrals

### Unions

- Unions provide more representation for injured workers than all other sources combined. If a worker was engaged in employment under a collective agreement when injured, his or her union or former union should be the first resource. Some unions will even help former members with claims arising out of injuries suffered in non-union employment.

### WCB Main Inspection Office

6951 Westminster Highway

Richmond, B.C. V7C 1C6

Telephone: (604) 273-2266

Toll-free: 1-800-661-2112 (if outside Vancouver)

Web site: [www.worksafebc.com](http://www.worksafebc.com)

### Employers' Advisors Office

Telephone: (604) 713-0303

Fax: (604) 713-0345

Toll-free within B.C. and Alberta: 1-800-925-2233

Web site: [www.labour.gov.bc.ca/eao](http://www.labour.gov.bc.ca/eao)

### Workers' Advisors Offices

Lower Mainland Regional Offices:

500-8100 Granville Avenue

Richmond, B.C. V6Y 3T6

Telephone: (604) 713-0360

Toll-free within B.C.: 1-800-663-4261

Fax: (604) 713-0311

204 - 32555 Simon Avenue  
Abbotsford, B.C. V2T 4Y2  
Telephone: (604) 870-5488  
Toll-free: 1-888-295-7781  
Fax: (604) 870-5494

Web site: [www.labour.gov.bc.ca/wab](http://www.labour.gov.bc.ca/wab)

- This is the primary resource for workers having difficulties with the Board. The advisors may obtain the claim file and provide workers with detailed, confidential advice about the claim. They have also prepared very readable written information for claimants.

**Workers' Compensation Appeal Tribunal (WCAT)**

150 - 4600 Jacombs Road  
Richmond, B.C. V6V 3B1  
Telephone: (604) 664-7800  
Toll-free within B.C.: 1-800-663-2782  
Fax: (604) 664-7898  
Web site: [www.wcat.bc.ca](http://www.wcat.bc.ca)

**Community Legal Assistance Society (CLAS)**

300 – 1140 West Pender Street  
Vancouver, B.C. V6E 4G1  
Telephone: (604) 685-3425  
Fax: (604) 685-7611  
Toll-free: 1-888-685-6222

- CLAS may be able to help if a client has lost their appeal to the Worker's Compensation Appeal Tribunal (WCAT) and wants the WCAT to reconsider their decision, or a court to overturn the decision; and if the advocate who helped the client at WCAT cannot assist anymore.

**WCB Main Inspection Office**

6951 Westminster Highway  
Richmond, B.C. V7C 1C6  
Telephone: (604) 273-2266  
Toll-free: 1-800-661-2112 (if outside Vancouver)

- Complaints about violations of health and safety regulations should be directed here.

**WCB Complaints Office**

Street Address: 6951 Westminster Highway  
Richmond, B.C. V7C 1C6

Mailing Address: P.O. Box 5350 Stn. Terminal  
Vancouver, B.C. V6B 5L5

Telephone: (604) 276-3053  
Fax: (604) 276-3103

- This office can be contacted when all internal remedies have been unsuccessful or if the worker has a complaint about matters that are not subject to appeal, such as rude conduct by WCB staff, failure to answer letters, or unfair procedures.

## 4. Internet Resources

### **WorkSafe B.C.**

Web site: [www.worksafebc.com](http://www.worksafebc.com)

- The Board's own site contains a wealth of material, including the complete Claims Manual, Appeal Division decisions (since January 1, 2000), the complete Reporter series of decisions, and most of the reports and other documents listed above. It also contains decisions of the old Appeal Division and the Review Division, as well as statistics and resources.
- A policy and legislation page is located at [www.worksafebc.com/law\\_and\\_policy](http://www.worksafebc.com/law_and_policy) with links to an online version of the Act, recent amendments, and various policy and practice materials. This is the most practical way to research current policies and practices, including the Board's two-volume compensation policy manual, which has the force of law.

### **Workers' Advisor's Office**

Web site: [www.labour.gov.bc.ca/wab/](http://www.labour.gov.bc.ca/wab/)

- This site, which is part of the Ministry of Labour, contains excellent plain language summaries of the key aspects of the system written for the average claimant, and other material as well. This service is free for anyone who is not represented by a union.

### **Workers' Compensation Appeal Tribunal**

Web site: [www.wcat.bc.ca](http://www.wcat.bc.ca)

- This site provides information about WCAT and various aspects of Workers' Compensation appeal matters. The "How to Appeal" section provides information on how to appeal, enables access to various appeal forms and provides internet links to WCAT publications as well as other resources that can assist in the appeal process.
- This site also contains WCAT decisions, as well as forms required for appeal.

## 5. Organizations

### **Workers' Compensation Advocacy Group**

300 - 1140 West Pender Street, Vancouver, B.C. V6E 4G1

Telephone: (604) 685-3425

Fax: (604) 685-7611

- An informal organization open to all advocates for injured workers, including union representatives, private and legal aid lawyers, workers' advisers, injured workers' group leaders, and others. The group meets monthly, and as a recognized stakeholder for injured workers, is regularly consulted by the WCB and government about WCB matters.

### **PovNet's wcb-bc Email List**

For more information, contact Jim Sayre at [jimsayre@telus.net](mailto:jimsayre@telus.net), or Penny Goldsmith at [penny@povnet.org](mailto:penny@povnet.org)

- PovNet sponsors an interactive, confidential email list for workers' advocates. The list enables members to post questions and information about WCB cases and matters, and to respond to other members' postings.

**BC Federation of Labour**

# 200-5118 Joyce Street, Vancouver, B.C. V5R 4H1  
Telephone: (604) 430-1420  
Fax: (604) 430-5917  
Website: www.bcfed.com

- The BC Federation of Labour represents more than half a million workers through affiliated unions in more than 800 locals, working in every aspect of the BC economy.

**6. Injured Workers Organizations**

**Canadian Injured Workers Alliance (CIWA)**

Web site: [www.ciwa.ca](http://www.ciwa.ca)

- The alliance is a national network of injured workers' groups. It exists to support and strengthen the work of local, provincial and territorial injured workers' groups by providing a forum for exchanging information and sharing experiences. The site contains links to other WCB sites across Canada.

**Canadian Injured Workers Society**

Web Site: [www.ciws.ca](http://www.ciws.ca)

- The Canadian Injured Workers Society was formed in 2005 by a group of injured Canadian employees and their family members from across the country who were interested in improving the workers compensation system in Canada. The Society is a non-profit corporation registered with Corporations Canada. The website contains up to date worker's compensation news and law court decisions as well as a discussion forum.

## II. WORKERS' COMPENSATION

### A. Introduction

The Workers' Compensation Act [WCA] is a provincial statutory social insurance plan under which personal injury, illness, or death to a worker arising out of, and in the course of, his or her employment leads to no-fault compensation rather than court-awarded damages.

Where a worker who is covered by the WCA suffers an injury or disease that arises out of the course of his or her employment, that worker loses the right to take legal action against any employer or worker covered by Workers' Compensation – including his or her own employer. The Supreme Court of Canada has upheld the bar against lawsuits as an integral part of the “historic compromise” that brought workers' compensation into existence at the beginning of the 20<sup>th</sup> century. Coverage is generally compulsory.

The worker can “elect” to sue a negligent “third party” (someone not covered by Workers' Compensation) or to claim compensation, in which case the Board can sue the third party in the worker's name; this is termed “subrogation”. If the worker claims compensation, the Board has exclusive jurisdiction to decide if it will take legal action against a third party. If it does take action and recovers more than the total value of the worker's benefits, the worker receives the difference minus a 29 percent administration fee. If the Board recovers less than the total value of benefits, the worker will keep the full compensation. A worker cannot waive or assign his or her right to compensation.

## ***B. Compensation Synopsis***

Compensation is generally payable where:

- a) the worker is covered under the Act;
- b) the worker has suffered an injury or disease or has died as a result of his work activities; and
- c) an application has been submitted to the Board in accordance with the required time limits and procedures.

The entitlement officers determine whether or not a worker is compensable under the scheme, with possible appeals proceeding to the Review Division and Workers' Compensation Appeal Tribunal.

## ***C. Assessments of Employers***

The economic theory that underlies the workers' compensation system is that the risk of loss through injury or occupational disease resulting from the workplace should be borne by industry as a cost of doing business. The WCA is administered by the Workers' Compensation Board, which is an independent administrative agency established by the provincial government. The program is funded by compulsory assessments on employers, which make up the Accident Fund. These assessments must be paid by the employer and may not be deducted from the employee's pay (s. 14). The Board gets preferential treatment in its power to collect from an employer. An employee whose employer does not pay premiums, despite the fact that he or she is operating a compensable business, is still covered by the WCA.

Industries are divided into classes and sub-classes. The total assessments for each class is fixed according to the principles of collective liability; the Board is to collect sufficient money to cover the past and estimated future costs of all the claims from workers in each sub-class. Each employer then pays its share, based on the size of its payroll and adjusted for the number of claims against the employer under the Board's "experience rating" scheme.

Some self-employed contractors are considered employers under the Act and therefore are assessed as such. These self-employed workers can purchase "personal optional protection" (POP) to cover their own risk of injury, in addition to the assessments they are required to pay to cover their risk as employers. This arrangement is common in the logging and construction industries.

One negative effect of the experience rating system is that employers obviously have an economic interest in contesting their employees' claims. This makes the system more adversarial, which might be seen to contradict the principles of Workers' Compensation.

## ***D. Who Is Covered***

### **1. Workers**

The WCA was amended on January 1, 1994 to expand the range of workers covered. **All workers are now covered, unless specifically exempted.** Even certain volunteers are covered, as are students engaged in work study programs that are approved by the Board. Before this amendment, most office workers and other white-collar employees were not covered. Since the amendment, only a few exceptions have been recognized, such as professional athletes who have accepted a high level of risk, casual baby sitters, and non-residents. Requests for exemptions may come from workers, employers, or may be initiated by the Board. Decisions regarding exemption status may be appealed.

One of the unintended consequences of this universal coverage is to further limit the injured worker's right to sue for damages, since it is most likely that the person responsible for the injuries will also be an employer or worker covered by the system. An extreme example of this was found in a malpractice case, *Kovach v. Singh (Kovach v. WCB)*, [2000] S.C.J. No. 3 (*Kovach*), where the Supreme Court of Canada found that the decision of the Board was not unreasonable. In this case, and in a similar Saskatchewan appeal, the Workers' Compensation Boards held that doctors treating an injured worker could not be sued for malpractice under the tort system because the injured worker was in the "course of employment" while undergoing treatment. The Board of Directors has responded strongly to cases that stray from this position. They will not allow any recourse to the tort system and have reaffirmed this bar to lawsuits in the policy directives.

## **2. Workers in Federally Regulated Industries**

While working in B.C., workers in federally regulated industries are directly subject to the workers' compensation system.

## **3. Federal Government Employees**

Federal government employees are governed by the Government Employees Compensation Act, R.S. 1985, c. G-5 which provides that injured federal government workers in a given province are to have their claims addressed by the provincial administrative body in that province, and are entitled to be compensated at a rate determined under the provincial workers' compensation scheme of the province in which they are employed (but paid out of a federal fund).

## **4. Workers Who Suffer an Injury While Working Outside B.C.**

Workers who suffer an injury while working outside B.C. may be covered if:

- a) they work in a compensable industry;
- b) B.C. is their residence and usual place of employment;
- c) the extra-provincial work lasts less than six months;
- d) the work is a continuation of their B.C. employment; and
- e) they are working for a B.C. employer (WCA s. 8(1)).

## **5. Employers**

Employers covered by the WCA must contribute to the Accident Fund based on compulsory assessments. Some categories of self-employed people may voluntarily register with the Board and pay premiums for their own work activities. The assessment rate is based on a complex system of classification relating to type of business and previous accident rates. **Employers should be referred to the Employers' Advisors Office** (see **Section I.B.3: Referrals**, at the beginning of the chapter, for contact information).

### ***E. The Board's Jurisdiction***

Section 96 of the WCA gives the Board exclusive jurisdiction over workers' compensation matters. The courts have generally respected this strong privative clause. Section 96 specifically grants the Board the exclusive jurisdiction to inquire into, hear, and determine:

- a) whether an injury has arisen out of or in the course of an employment;
- b) the existence and degree of disability by reason of an injury;
- c) the permanence of disability by reason of an injury;
- d) the degree of reduction of earning capacity by reason of an injury;
- e) the average earnings of a worker, for the purpose of levying assessments, and the average earnings of a worker for purposes of payment of compensation;
- f) the existence of the relationship of a member of the family of a worker as defined by the Act;
- g) the existence of dependency;
- h) whether an industry is within the scope of the Act, and the class to which an industry should be assigned for the purposes of the Act;
- i) whether a worker is in an industry within the scope of the Act and entitled to compensation under it; and
- j) whether a person is a worker, a subcontractor, a contractor or an employer within the meaning of the Act.

### ***F. Governance***

Since 2002, the WCB has been governed by a Board of Directors which is composed of seven Directors is appointed by the government to oversee the Board and its policies. One Director is selected from a list provided by the B.C. Federation of Labour. Another Director represents employers, while the remaining Directors are chosen based on professional or "public interest" backgrounds. Under Bill 63, a policy of the Board was given a binding effect (WCA, ss.99 and 250). Thus, the Directors who create those policies are crucial to the fairness of the system.

### ***G. Health and Safety Regulations***

The Workers' Compensation Board is also responsible for enacting and enforcing health and safety regulations under Part Three of the Act. The Industrial Health and Safety Regulations have been replaced with the Workers' Compensation Board's Occupational Health and Safety Regulation, B.C. Reg. 296/97. These regulations can be conveniently searched online at [www2.worksafebc.com/publications/OHSRegulation/home.asp](http://www2.worksafebc.com/publications/OHSRegulation/home.asp). Workers or employers interested in the regulations can be referred to the Board's Health and Safety Department.

**NOTE:** Readers should also be aware that significant changes are being made to these and other WCB regulations as part of the government's regulation reduction program. For this reason it is very important to consult the online version to ensure that the applicable regulations are being followed. The date of enactment should always be checked to determine which version was in effect at the time of injury.

## ***H. A Worker May Refuse Unsafe Work***

Under the existing Occupational Health and Safety Regulation, Part 3, a worker may refuse work if the worker has reasonable grounds for believing the work is unsafe. Work is deemed unsafe if the work activities, the conditions of the work, or the conditions that would result if the work were done creates or would create a significant risk that the worker or another person may be killed, seriously injured, or suffer serious illness. The right to refuse, however, does not apply if the refusal would directly endanger the health or safety of another person.

The right to refuse continues until the employer has taken remedial action to the satisfaction of the worker, or an officer has investigated the matter and advised the worker to return to work.

A worker who has exercised his or her right to refuse unsafe work must immediately report the refusal and the reasons for it to his or her supervisor or to the employer. The worker must remain available at the workplace during normal working hours until the investigation is complete.

## ***I. Prohibition Against Discriminatory Action***

Section 151 of the WCA states that an employer or union must not take or threaten any retaliatory action against a worker for exercising any of his or her rights under Part Three of the Act. A non-exhaustive list of such discriminatory actions is provided in s. 150. This list includes: suspension, lay-off, or dismissal; demotion; reduction in wages or transfer of duties or of location; coercion or intimidation; or the imposition of any discipline, reprimand, or penalty.

Complaints should be made in writing to the board within the time limits set out in s. 152. Section 152(2) places the burden of proving the alleged discriminatory action did not occur on the employer or union as applicable. The Board has been given a wide range of remedies under s. 153. It is important to note that this section is **not** for human rights complaints, but only for retaliation against a worker for exercising the rights provided by the WCB system.

## ***J. Conditions That May Be Compensated***

### **1. Causation Requirements**

The key question that must be determined before a claim can be accepted is whether the injury, death, or disease occurred as a result of employment. Sections 5, 6, and 8 of the Act address causation in general terms. The determination of whether an injury arose out of and in the course of employment can be made with reference to factors such as:

- whether the injury occurred on the premises of the employer;
- whether it occurred in the process of doing something for the benefit of the employer;
- whether it occurred in the course of action taken in response to instructions from the employer;
- whether it occurred in the course of using equipment or materials supplied by the employer;
- whether the risk to which the worker was exposed was the same as the risk to which he or she is exposed in the normal course of production;
- whether the injury occurred during a time period for which the worker was being paid;

- whether the injury was caused by some activity of the employer or of a fellow worker;
- whether the injury occurred while the worker was performing activities that were part of the regular job duties; and
- whether the injury occurred while the worker was being supervised by the employer.

This list is not exhaustive, and none of the above factors alone is conclusive.

Additional information can be found in WCB's Rehabilitation Services and Claims Manual. Chapters 3 and 4 are very detailed. Students handling appeals should note that most causation disputes come down to matters of evidence and not law.

## 2. Personal Injury or Death

Compensation may be paid for personal injury or death that arises out of, and in the course of, employment. Section 5(4) of the WCA states that where the injury is caused by an accident that is shown to have arisen out of employment, it is presumed to have occurred in the course of employment as required for compensation. An accident can also include someone else's intentional act.

The injury need not occur while the worker is engaged in specific productive acts, so long as it occurs within the broad circumstances of carrying out the employment duties. Travelling may be considered an activity in the course of employment if travel is part of the worker's duties or if the accident occurs on the employer's property or on a "captive road" provided and controlled by the employer, for example logging roads used by wood workers.

The *Kovach* decision upheld the Board's policy that a worker who is undergoing treatment for a work injury remains in the course of employment, even if the treatment is taking place long after the job itself has ended (see above **Section II.D: Who is Covered**). A result of this decision is that workers in these particular situations cannot sue for medical maltreatment.

If serious and wilful misconduct on the part of the employee is the sole cause of the injury, no compensation is paid unless death or severe disability results.

If the worker suffered from a pre-existing disability of a similar nature, permanent compensation is usually based on the difference between the new permanent disability and the pre-existing disability (s. 5(5)).

### a) *Occupational Diseases*

Occupational diseases are compensable as if they were work-related injuries. Section 6 of the WCA states that:

- i) If a worker suffers from an occupational disease and is thereby disabled from earning full wages at the work at which he or she was employed, or the death of a worker is caused by an industrial disease; and
- ii) The disease is due to the nature of any employment in which the worker was employed, whether under one or more employments;

Then, compensation is payable as if the disease were a personal injury arising out of and in the course of that employment.

A healthcare benefit may be paid even if the worker is not disabled from earning full wages at the work at which he or she was employed. The date of disablement will be treated as the occurrence of the injury. This may result in the worker

receiving nothing but healthcare benefits for diseases with a long latency period such as asbestosis and most cancers.

Consult Schedule B of the WCA for a list of occupational diseases the Board recognizes as arising from specific types of employment or industries. For example, where a worker was, at or before the date of disablement, employed as a coal miner, silicosis is compensable, unless it is proven to have been caused by non-work factors.

If the worker, at or immediately before the date of the disablement, was employed in a process or industry mentioned in the second column of Schedule B, and the disease contracted is the disease in the first column of the schedule set opposite to the description of the process, the disease will be deemed to have been due to the nature of that employment unless the contrary is proven.

The omission of a disease from Schedule B does not mean that no compensation is payable. However, a presumption of causation only arises for diseases mentioned in Schedule B. Other diseases may be recognized by regulation, or in a particular case. For example, a waitress or bartender working in a smoking environment may file a claim for second-hand smoke causing lung disease. Evidence that the disease is caused by the employment is required. If a fire fighter suffers a heart attack, the presumption is contained in s. 6.1 of the Act itself.

**b) *Psychological Damages***

Receiving compensation for psychological damages or conditions has always been difficult. Section 5.1 of the WCA however, now expressly states that a worker **cannot claim for mental stress** unless it is the psychological consequences that arise directly from a physical injury, or is an acute reaction to a sudden and unexpected traumatic event arising from the worker's employment, and is diagnosed as such by a doctor. Mental stress arising from a decision by the worker's employer related to the employment (e.g. a change in job description or working conditions) is specifically excluded from compensation, as is stress arising from harassment by the employer, co-workers or customers, or from highly stressful duties or working conditions.

The B.C. Court of Appeal recently found that some aspects of Policy #13.30 (Rehabilitation Services and Claims Manual, Volume II) – which sets out the way the WCB applies s. 5.1 – violates the Charter by discriminating against workers who suffer psychological disabilities caused by their work. The Court struck out elements of the policy that purported to qualify the nature of the event that could be considered “traumatic”. The Court did not, however, strike down s. 5.1 itself, or the main aspects of policy # 13.30. See *Plesner v. British Columbia Hydro and Power Authority*, 2009 BCCA 188.

**c) *Hearing Loss***

Significant hearing loss caused by exposure to industrial noise in the course of employment is compensable. The worker must submit tests showing the loss of hearing and complete a special application form listing all employment and non-employment noise exposure. See s. 7 and Schedule D of the WCA.

**d) *Conditions Resulting from Work in Conjunction With Other Factors***

Where the personal injury or disease is superimposed on an already existing disability, the worker will be compensated only for the proportion of the disability that may reasonably be attributed to the work-related personal injury or disease. The measure of the disability attributable to the personal injury or disease is – unless it shown otherwise – simply the magnitude of the difference between the severity of the worker’s disability before the claim date, and the severity afterwards.

Where the work combines with non-work factors to cause a new disability, the worker may be compensated if the work was a significant cause of the disability. It need not be the primary cause; the proportion of the disability attributable to the work-related injury can be less than 50 percent. Work outside of B.C. is regarded as non-work exposure for compensation purposes. However, workers compensation boards across Canada have entered into an “interjurisdictional agreement” that provides for reciprocal coverage of some disabilities arising from work exposure or activities in different jurisdictions, and also enables the ruling Board to administer a claim in another province. The Board may try to apportion benefits in cases where the disability is partially caused by non-work or out-of-jurisdiction factors according to the percentages of causation – at least when assessing a pension – although it is not clear that the Act authorizes this.

**e) *Injuries that Occur Outside of B.C.***

If an injury occurs while the worker is working outside of the province, and the injury would normally entitle the worker or the worker’s dependents to compensation, WCB will pay compensation if:

- a) the employer’s place of business is located in the province;
- b) the worker’s residence and usual place of employment is in the province;
- c) the employment requires the worker to work both in and out of the province;  
or
- d) the worker’s out-of-province employment immediately followed the worker’s employment by the same employer in the province, and the out-of-province employment has lasted less than six months.

**K. *Benefits***

**NOTE:** It is important to be aware that there are **two** Workers’ Compensation Systems that work in tandem. One system pertains to injuries which have occurred before June 30, 2002 and the other to injuries which have occurred on or after June 30, 2002. In cases where there are significant differences in the law pertaining injuries that occur before and after June 30, 2002, this distinction will be clarified with bold text.

A key element of all benefit calculation is the worker’s “average earnings”, i.e. the amount of income the worker received over an appropriate period of time before the injury. **For injuries that occurred BEFORE June 30, 2002** the benefits were 75 percent of a worker’s gross average earnings, and the Act gave the Board considerable flexibility in determining this figure depending on daily, weekly, monthly, or annual remuneration, or even on the probable yearly earning capacity of the worker at the time of the injury. Earnings over the previous year were the most common measure, but the Board

may also use other periods as needed to better reflect the worker's actual earnings and earning capacity. These rules still apply in most cases to injuries which occurred before June 30, 2002.

**For injuries AFTER June 30, 2002** the rate has been reduced to 90 percent of the worker's net (take home) pay. The new system also greatly restricts this flexibility for workers who were injured after June 30, 2002, by requiring the Board to use the exact previous one-year earnings of the worker except for narrowly defined exceptions. Actual employment income is averaged over the whole preceding year. This makes it much more difficult for some workers to receive a fair benefit rate where they had irregular earnings prior to their injury.

One group of workers who may benefit from the new rules introduced in Bill 49 are those who received employment insurance (EI) benefits for part of the preceding year. Under s. 33(3.2) of the Amendment Act, EI benefits will be included in the calculation of the worker's earnings for the year if the worker was, in the Board's opinion, employed in "an occupation or industry that results in recurring seasonal or recurring temporary interruptions of work".

With the introduction of Bill 49, WCB benefits will now be adjusted annually according to inflation, rather than the previous method of twice per year. Benefits will now be adjusted at a rate 1 percent less than the actual inflation rate. There is also a 4 percent cap on inflation adjustments, regardless of whether the actual inflation rate is higher. In addition, **this change applies to all workers**, including those injured before June 30, 2002. If the current deficit spending by the U.S. and other governments results in high rates of inflation, once the economy begins to recover as many have predicted, these limits on CPI adjustments will have major impact on the real value of workers' benefits.

It is also important to note that now, under s. 35.1(8), **a recurrence of an injury is treated as a new injury**. Thus if a worker was injured before June 30, 2002, and then had a recurrence at some point after this date, the recurrence would be treated as a new injury and the benefits would be awarded at the newer, less generous rate.

However, one must distinguish a "recurrence" from a "deterioration". In *Cowburn v. Worker's Compensation Board of British Columbia*, 2006 BCSC 722, the court found that the Director's policy which treated a deterioration in a worker's disability as a recurrence to which the new rules would apply was based on a patently unreasonable interpretation of the Act. Accordingly, when a worker's permanent disability that began before June 30, 2002 becomes worse, the increased benefits will be based on the older, more generous provisions that were in force when the disability first arose.

## 1. Temporary and Permanent Compensation

Compensation may be paid for lost earnings and lost earning capacity.

**For injuries that have occurred BEFORE June 30, 2002:** Temporary wage loss and permanent pension benefits are calculated at 75 percent of the "wage rate" recognized by the Board, up to the maximum earnings insurable for the year of the injury. In 2001, the maximum insurable earnings were \$58,000 per year, so a worker injured in 2001 could receive \$3,625 per month (75 percent of \$58,000 divided by 12). Workers earning more than the maximum earnings rate are not compensated for the balance of their losses, and cannot sue for the difference.

**For injuries that occur AFTER June 30, 2002:** Bill 49 amends the benefits formula. For workers injured on or after June 30, 2002, benefits are based on 90 percent of the worker's net (take home) pay. This results in approximately a 10 percent decrease in benefits for most workers.

## 2. Short Term and Long Term Wage Rates

**For injuries that occur BEFORE June 30, 2002:** During the “initial payment period”, the first eight weeks of compensation, the wage loss rate is determined by looking at what the employee was actually earning at the time of the injury. The guiding principle for determining wage rates is stated in s. 33(1) of the WCA as the “actual loss of earnings suffered by reason of the injury”. At the beginning of a claim, the wage-loss benefits are calculated as a short-term earnings rate – usually 75 percent of the worker’s gross earnings at the time of the injury.

The Board reviews the wage rate after eight weeks of benefits, and recalculates a **long-term earnings rate**. This is generally based on the worker’s earnings for the one-year period before the date of injury (although other periods may be used). If the worker changed jobs, or had a period of unemployment during the previous year, the average monthly or weekly earnings during this time could be reduced so that it fails to represent the worker’s “actual loss of earnings”. In such cases, a different averaging period or an altogether different method of determining wage rates should be employed. For example, the benefits may continue at the wage rate at the date of injury, or be based on the worker’s earning capacity at the date of injury, or be based on the average earnings of all such workers in that occupation. Even if a client does not complain about the long-term wage rate decision, an advocate should always look at the decision and consider whether some change should be sought.

**For injuries that occur AFTER June 30, 2002:** During the “initial payment period”, the first 10 weeks of compensation, the wage loss rate is determined by looking at what the employee was actually earning at the time of the injury. The Board does not consider the worker’s actual income tax, EI or CPP deductions in determining benefits in the first 10 weeks of the claim. Instead, benefits for all workers are based on 1.5 times the basic personal deduction allowed under the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) for a single taxpayer, plus the standard EI and CPP contributions. For single workers, this results in benefits during that period of only 90 percent of the worker’s take home pay. Workers who have several dependants and hence much lower actual tax deductions, who would otherwise be entitled to a higher level of benefits, are instead assessed the same way as single workers.

The Act allows the Board to determine average earnings differently if a worker’s pattern of employment at the time of injury was “casual in nature”. Where this is found to be the case, the worker’s earnings over the immediately preceding 12 months of employment are considered a more accurate reflection of the lost wages. (Consequently, the average earnings calculated at the outset of the claim will be the same as those calculated as long-term earnings later in the process.) Practice Directive #C9-9 describes a two-step investigation procedure to determine whether a workers pattern of employment is casual in nature. This can be found at [www.worksafebc.com](http://www.worksafebc.com) under the “Regulation and Policy” section. Where the job at the time of injury is scheduled to last for three months or longer, the worker will not be considered a casual worker. Where the job is scheduled to last for less than three months then the employee may be considered a casual worker if he or she has a history of short term jobs (less than three months in length) with significant absences from employment between them (greater than the time spent employed). The result is that a “casual worker”, who may have been earning a good wage at the time of the accident, is likely to be eligible for less compensation during the initial payment period than his or her counterpart in a “permanent” job.

The Board reviews the wage rate after 10 weeks of benefits, and recalculates a **long-term earnings rate**. The process of calculating long term wage rates is far more rigid than it was under the previous system. Section 33.1 of the Act sets the immediate preceding one year earnings as the default time span with which to calculate the long-term wage rate, with few exceptions. The wage rate is the basis for all temporary, permanent and rehabilitation

benefits that are paid under the claim, thus the Board has far less authority to establish a fair rate that really reflects the worker's lost earnings.

For example, a worker who earned \$3000 per month take home pay at the date of the injury may have been laid off for six months of the previous year due to local economic conditions. If the worker is in what the WCB considers a "highly seasonal" occupation, any EI benefits the worker received while laid off would add to the earnings; otherwise, only the wages the worker received during the six months of actual employment would count. But the Board is required to divide this income over 12 months, so the worker's average earnings would be reduced to \$1500 per month and the benefits would be based on 90 percent of that amount, or \$1350 if the worker is totally disabled.

The Act does allow the Board to determine average earnings differently, in "exceptional" circumstances if the one year average would be "inequitable" (s.33.4). This provision does not apply in the case of "casual" workers (in which case the 12 month average is rigidly applied) or "permanent" workers who have been employed for less than 12 months (in which case 33.3 is used). See Practice Directive #C9-12; an exceptional case has been interpreted to mean one that is "truly extraordinary", "unusual", or "irregular", such that "the worker's circumstances in the year prior to the injury fail to provide any meaningful measure of their employment history". Examples might include a non-compensable illness or injury, or maternity/paternity obligations. To arrive at the long-term average earnings figure that better reflects the worker's loss of earnings, officers may: i) exclude a significant atypical disruption (i.e. one lasting more than six weeks) from the calculation of the worker's long-term average earnings; and/or ii) base the worker's long-term average earnings on a longer period of time (e.g. 24 months) or on a shorter period of time.

In the case of a worker who has been working, on a "permanent" basis, less than 12 months for the pre-accident employer, section 33.3 of the WCA allows earnings to be calculated based on what a person of similar status employed in the same type and classification of employment would earn in 12 months. Section 33.3 is not applicable where the employment is determined to be temporary.

### **3. Temporary Wage Loss Benefits**

Temporary wage loss benefits are paid for time lost beyond the day of the injury, for a period as long as the worker suffers temporary (total or partial) disability. As discussed above, an assessment of the wage rate will take place after 10 weeks, and consequently the benefits payable may change at that time to better reflect lost long-term earnings. These benefits cease once a worker's condition stabilizes or "plateaus". Partial temporary wage loss benefits are relatively rare and only paid where there is actual evidence of suitable employment immediately available to the worker notwithstanding the injury. Usually, the Board recognizes the worker's right to full wage loss benefits until he or she can return to some type of employment, or until the condition appears to have stabilized.

### **4. Income Continuity Benefits**

Although classified as rehabilitation benefits (described below), these are payments to provide interim support for the worker while the amount of a permanent disability pension is determined. A worker's advocate should always request these benefits as they are often the only source of income a worker will have between the time the worker's condition stabilizes and the time the pension benefits are assessed. These are short-term, temporary benefits. If a worker refuses employment, he or she may be refused income-continuity benefits. See Policy C11-89.10 in the Rehabilitation Services and Claims Manual for more information regarding the assessment of income continuity benefits.

## 5. Vocational Rehabilitation

Vocational Rehabilitation benefits have been drastically cut since 2002, because of changes to the Board's policies and practice, although the key provision of the Act, s. 16, has not been changed. The annual expenditures on vocational rehabilitation are now less than 2% of what they were in 2001.

Rehabilitation benefits are discretionary benefits, which can include:

- monthly compensation (in the same amount as wage loss benefits) to support a worker during a rehabilitation program;
- payment of tuition, books, and other costs of the course itself;
- a job search allowance (also in the same amount as wage loss benefits) to support the worker while looking for suitable employment if he or she cannot return to the pre-injury job;
- a training on the job allowance or wage subsidy to encourage an employer to allow the worker to learn new employment skills, or gain experience in a new field.

Whenever a worker is unable to return safely to his or her old occupation, an advocate should request a referral to a WCB rehabilitation consultant.

Rehabilitation decisions can be reviewed but cannot be appealed to the Workers' Compensation Appeal Tribunal. A worker may receive retraining if he or she is unable to return to the previous job, if the previous job is a risk to the worker's health, or if the previous job would put the worker at a long-term disadvantage. If a worker is cooperating with re-training, he or she should be continued on benefits at the full wage loss rate. If the benefits are cut but the worker thinks he or she is cooperating, an appeal should be filed. Rehabilitation will usually be provided only as necessary to restore the worker to the same earning capacity as the long-term wage rates determined by the Board. This is another good reason to review the wage rate decision.

In fatal cases, a surviving spouse may be eligible for retraining.

Policies C11-85.00 to 91.00 in the Rehabilitation Services and Claims Manual set out the five phases of vocational rehabilitation:

- Phase One: A WCB Vocational Rehabilitation Consultant will make an effort to assist the worker to return to the same job with the same employer (the "accident employer").
- Phase Two: If the worker cannot return to the same job, the Board consultant works with the accident employer to make worksite accommodations and job modification, or to provide alternative in-service placement, with a view to finding the worker a new position within the accident employer's business.
- Phase Three: If the employer is unable or unwilling to accommodate the worker, the consultant identifies suitable occupational options in the same or related industry.
- Phase Four: If the worker is unable to return to employment in the same or related industry, the consultant explores opportunities in all industries, with emphasis placed on the worker's transferable skills, aptitudes and interests.
- Phase Five: If the existing skills are insufficient, the consultant uses training programs to help the worker acquire new skills. In addition, the consultant assists the worker to secure employment once training is complete.

## 6. Permanent Disability Pensions

Once a worker's condition has stabilized or "plateaued," wage loss benefits will cease. If the worker is still disabled, he or she will be assessed for a permanent disability pension instead.

WCB will disregard the fact that an injured worker has been unable to find a suitable new job if it considers the unemployment to be due primarily to an economic downturn, rather than work-related factors.

The Board will also require most workers to mitigate their loss of earnings by moving to a larger city to find suitable employment, if there are no suitable jobs in the community. If the worker refuses, he or she will be deemed to earn the amount the Board claims would be available in the city.

**NOTE:** Workers who also qualify for Canadian Pension Plan (CPP) disability benefits will have one-half of those benefits deducted from their WCB pensions (a loss of up to \$478 per month, as half of the \$956 maximum currently payable by CPP). This deduction is meant to represent the employer's share of the benefits paid for the same disability as the WCB claim. If a CPP pension is partly based on non-compensable disabilities, no deduction will be made for that proportion of the CPP

For **permanent total disability**, this amount is determined depending on when the worker incurred his or her injury. For injuries that occurred **before June 30, 2002**, the worker is paid 75 percent of his or her long-term gross wage rate for life. As of 1999, this was to be not less than \$1,269.23 per month, and not more than \$3,615.08 per month. For injuries that occur **after June 30, 2002**, permanent total disability awards will be based on 90 percent of average net earnings, and benefits will end at age 65.

For **permanent partial disability**, the Board would previously calculate the worker's loss of earnings and earning capacity in two ways: "loss of function method" and the "projected loss earnings method". The worker would automatically receive the higher of the two results. However, if the worker's permanent disability occurred on or **after June 30, 2002**, there are very strict limits placed on the "loss of earnings" method for injuries. This also applies to workers injured before June 30, 2002 in some cases; if the Board believes that it was not apparent before that date that the worker would be permanently disabled, then their disability will not be considered to have become permanent until after that date.

### **a) *Loss of Function Method***

The first calculation, for permanent partial disability pensions, (called the "loss of function method") compares the worker's degree of physical impairment to that of a totally disabled person.

Generally, only disabilities that could reduce earning capacity receive compensation, and there are no payments for pain and suffering or loss of enjoyment of life. The Board's policy manual contains detailed schedules of percentage disability for different types of disabilities. Types not listed are estimated, and there is usually some degree of discretion in the process.

In the past, the Board relied heavily on its own doctors, who usually performed a detailed "permanent partial disability exam" and recommended a percentage of total disability representing the worker's impairment. The disability awards officers usually followed the doctor's recommendations closely.

Under the "ARCON project", which has been approved for general use, Board doctors will rarely be involved. Instead, a physical therapist will measure the

worker's range of motion using computer-controlled equipment. This will result in an immediate report describing the worker's physical impairment, which the disability awards officer will use to determine the degree of physical impairment. Such decisions are difficult to appeal, and workers' advocates have raised serious concerns about the methodology and the choice of ARCON (a company which otherwise has only supplied a few U.S. insurance industry customers) to supply the equipment. WCB officials maintain that ARCON results are only an alternative means of measuring aspects of disability such as range of motion, and are not a substitute for its own decision-making process on other aspects such as subjective pain, etc.

One difficult issue for many workers is the Board's policy that limits benefits for "chronic pain" to 2.5%, with no consideration of a loss of earnings pension. This has been challenged as discriminatory in a human rights complaint that is now before the BC courts; see *Figliola v. British Columbia (Workers' Compensation Board)*, 2009 BCHRT 83 (the B.C. Supreme Court has reserved its decision regarding application for judicial review).

**b) *Projected Loss of Earnings Method***

This second calculation, for permanent partial disability pensions, (called the "loss of earnings method") compares the long term wage rate that a worker was able to earn per year before the injury to that of what the worker is able to earn after the injury.

**Previously**, the Board was required to pay a pension based on the worker's actual loss of earnings whenever this was "more equitable". For example, if a back injury regarded as a 5 percent physical disability prevents an older worker from returning to a cleaning job at which she was earning \$2000 per month after deduction, and she could not be retrained for lighter work due to her age and other factors, a full loss of earning pension of about \$2000 per month would have been awarded to reflect the fact that the injury made her totally unemployable.

The **new system** requires that loss of earnings pensions will only be paid if the worker fulfils the "**so exceptional test**": where it appears that the combined effect of a worker's pre-injury occupation and disability resulting from the injury is considered "so exceptional" that an amount determined under the loss of function method would not appropriately compensate the worker. (See WCA s. 23(3.1) and Item #38.00 in the Rehabilitation Services and Claims Manual).

In addition, the policy now requires that in order to be eligible for a loss of earnings assessment, it must be "medically impossible" for the worker to return to a job in same classification as the old one, and that the worker cannot adapt to a new occupation without suffering what the Board regards as a significant loss of earnings (Item #40.00 in the Rehabilitation Services and Claims Manual).

This may mean that a worker whose functional disability is relatively moderate – such as a back injury that precludes heavy lifting – but who cannot return to the previous employment due to age, education, language, and other "non-compensable" factors, may not be eligible for a loss of earnings pension. Indeed, the effect of the new provisions of the Act and policies has been that almost no one qualifies for a loss of earnings pensions. Many workers who cannot return to their old occupations or be retrained will be left with only the basic partial pension. Therefore, as in the example of the worker above, that worker would only receive 5 percent of 90 percent of her net earnings, which would work out to be about \$90 per month.

However, beginning in 2008, the WCB began looking more closely at the physical requirements of the job, widening the definition of essential skills required for the job to include the physical ability to perform the skill – which may be something as basic as carrying heavy loads or swinging a hammer. (See Item #40.00 in the Rehabilitation Services and Claims Manual)

Those few pensions that are still based on the worker's loss of earnings will usually be "deemed" on the basis of what the WCB thinks the worker can earn after the injury, not what the worker is actually earning. For example, a worker who cannot return to a pre-injury job that paid \$4000 per month may find new employment for \$2000 per month. Instead of accepting the worker's own experience, the Board may decide that over the long term the worker can find a different kind of job – perhaps in a larger city—that pays \$3000 per month, and calculate the benefits accordingly. Instead of getting a loss of earnings pensions representing the actual \$2000 per month the worker is losing, he would receive only \$900 per month – 90 percent of the \$1000 the Board "deems" him to be losing.

**c) *Benefits after Age 65***

Pension benefits now end at age 65 in almost all cases. Pensions will only continue if the worker presents "clear and objective evidence" that he or she would have worked past age 65 but for the injury. The Board is required to set aside an amount equal to five percent of the worker's pension benefits, which the worker can supplement up to five percent more from his or her monthly benefits. These amounts, plus interest, will be paid as a lump sum retirement benefit to the worker at age 65 (or later, in the presence of the aforementioned "clear and objective evidence"). In many cases, the amount of the lump sum will be no more than a few months of benefits. After that, the worker will get no additional compensation for the work injury, no matter how long he or she lives. Should the worker die before receiving the lump sum retirement benefit, it will be paid to the worker's dependents or estate.

**7. Medical Aid Benefits**

The Board must pay for necessary medical treatment, including physicians and hospital bills, physiotherapy, drugs, artificial limbs, hearing aids, and special transportation. Allowances for personal care and for structural alterations to the home may also be paid to paraplegics and other severely disabled workers.

The Board has the right to supervise a worker's treatment (s. 21) and to authorize any surgery. If a worker decides to undergo surgery or other treatment that is not authorized by the Board, the costs may not be paid, and if the injury is worsened by the treatment, benefits may be cut off or reduced. The Board usually agrees to pay for surgery recommended by the worker's own doctor, but the doctor should ask for the Board Advisor's approval. The Board often refuses to pay for drugs or physiotherapy its advisors consider unnecessary. Notwithstanding the 75-day rule, the Board now agrees that each Medical Aid decision can be appealed.

## 8. Benefits in Fatal Cases

**NOTE:** Fatality benefits have changed under Bill 37. The bill retroactively affects all deaths occurring on or after June 30, 2003. Among the fatality amendments, the more significant changes include (see s. 17 of WCA for full details):

- The modification of the definition “child” so that a child eligible for compensation now includes a child under 19 years of age and a child under 25 years of age who attends a school; and
- Changes to survivor benefits – for example, benefits may no longer be lost upon re-marriage, and survivors’ pensions will now be terminated when the worker would have reached age 65.

Where death results from a compensable injury or industrial disease, the surviving dependants may receive lump-sum payments or monthly pensions based on the deceased worker’s earnings. These pensions cannot exceed the statutory maximum, and are adjusted in accordance with changes in the Consumer Price Index. The amount of the pension for spouses without dependent children depends on the surviving spouse’s age (s. 17). Survivors can receive benefits even though the worker was not employed at the time the disability began, and therefore was not eligible for any benefits himself.

A separated spouse may receive benefits based on the amount of support the deceased worker would likely have contributed had he or she survived (s. 17(9)). A common law spouse is entitled to benefits after three years of cohabitation or after one year if there are children. However, compensation may not be paid, or may be reduced, if there is a separated spouse as well.

Dependant benefits may be suspended when children reach 19, or 25 if they are still attending school. In older cases, a spouse of a deceased worker who remarried might have lost his or her benefits. Under the new legislation, there are no such exclusions. Instead, s. 19(2) states that a person whose payments were discontinued under a former section is entitled to complete payment of all benefits that he or she would have been entitled to – as though the section had not applied.

## 9. Suspension of Benefits

Benefits may be suspended:

- a) if a worker persists in unsanitary or injurious practices, which tend to **prevent or slow recovery**;
- b) if a worker refuses to submit to medical or surgical treatment, which, in the opinion of the WCB, is **reasonably essential** in promoting recovery;
- c) if a worker fails to attend a medical examination arranged by the Board; or
- d) if a worker is in prison, in which case benefits will cease, or be paid to his or her dependants.

**NOTE:** The policy relating to incarceration and the provision of the Act on which it is based (s. 98(3)) have been challenged as possible Charter violations. In 1993, a panel of the Appeal Division ruled that the policy was not authorized by the Act, because it automatically cancelled all benefits upon imprisonment (unless there was a qualifying dependant), without regard to the nature of the benefits or the ability of the worker to engage in

employment while in custody. The Governors and Panel of Administrators have considered this policy – the result being that wage loss benefits will be cancelled.

The Board may also divert compensation from a worker for the benefit of his or her dependants if the worker is not supporting them.

Under s. 57.1 of the Amendment Act, 2002, the Board may withhold or reduce benefits for any period the worker does not provide requested information (unless the Board finds that it was unclear in communicating the requirement, or erroneously concluded that the worker was being uncooperative). However, such benefits will be paid when the worker provides the necessary information.

## 10. **Emergency Assistance**

Many workers need immediate income if they are waiting to be accepted or their benefits have been disallowed or terminated. They should consider alternate sources: social assistance, which may provide a crisis grant for immediate temporary relief or longer term relief if a decision is being appealed; EI sickness benefits; CPP disability pensions; any plans available through their place of work or union; ICBC (if an automobile was involved); or private disability insurance.

### *L. Claims Procedure*

#### 1. **Reporting the Injury**

All injuries that cause a loss of work, or which could lead to a future claim, should be reported **as soon as possible** by the employee or, if death results, by the employee's dependants, to the superintendent of the place of employment, first aid attendant, or other official. Claims have been denied (at least until an appeal took place) because a worker waited even a few days, hoping the pain would go away. In all but the most minor cases, workers should also seek medical attention promptly.

#### 2. **Election**

In certain cases, an employee may choose to sue the person or company responsible for causing a work injury rather than making a claim for Workers' Compensation. If the injury is caused by a person not covered by the WCA (i.e. a delivery driver injured by a private citizen in a motor vehicle accident), then the worker can elect to sue a non-covered "third party" instead of claiming compensation. Such an "election" is an important and complex decision (see s. 10 of the WCA) and workers should be referred to the Workers' Advisors Office at (604) 713-0360 or toll-free at 1-800-663-4261, before deciding whether to claim compensation. If a worker chooses to pursue a court action, and is unsuccessful or the award is less than he or she would have received under the compensation regime, the worker may still be able to receive compensation. However, the original claim for compensation must have been made within the time limits outlined below.

#### 3. **Making a Claim**

The employer must complete a report to the Board within **three** days of receiving the employee's report, or immediately if death results. If there is time lost, or medical expenses, the worker must also fill out an Application for Workers' Compensation benefits. The attending physician also completes a Physician's First Report within three days of first seeing the worker, and fills out progress reports after each visit. An employee has **one year** to make

a claim for compensation under s. 55 of the WCA. This may be extended to three years in certain circumstances. In extreme cases, the Board may consider even longer extensions.

Workers can now call the WCB directly to report an injury and receive personal assistance with their claim. Teleclaim is available to workers across the province, Monday to Friday, from 8 a.m. to 4 p.m. at 1 888 WORKERS (1 888 967-5377), or #5377 for TELUS, Rogers, and Bell mobility customers. Teleclaim is designed to simplify the process, reduce the amount of paperwork and provide a personalized service based on each individual's needs. Before calling the Board to report an injury, the worker should write down the key information about the job, how the injury occurred, and what the doctor has said about the condition. The worker's statement during a Teleclaim report will form part of the claim file, and could be used as evidence in a future appeal proceedings.

#### **4. Procedure After Application**

The family doctor plays a crucial role in the worker's claim and his or her treatment. The WCA requires that the doctor give all necessary advice and assistance to a worker making application for compensation, including furnishing proof that may be required. Some doctors are very helpful to injured workers, while others refuse to get involved in what they consider a legal issue. Such an attitude can be very harmful if there is a medical dispute between the Board and the worker.

The Board has extensive inquiry and investigative powers. It may require the worker to be medically examined by a WCB staff doctor or by independent consultants. WCB officers called Claims Adjudicators, Disability Awards Officers, and Rehabilitation Consultants decide whether to accept the claim and what benefits, if any, should be paid. Although rarely used, the Board has the authority to conduct a formal inquiry at which the claimant and other witnesses are compelled to appear and be examined. Important decisions occur at various times, as a result of the interaction and correspondence between various WCB officers, the worker, the family doctor, and any specialist.

#### **5. The Case Management Process**

The WCB operates under a case management process in cases where the individuals are recovering from complex and costly injuries and illnesses. The key features of case management include a case manager who oversees the delivery of services for the entire life of the claim. It is also supposed to include regular multidisciplinary team meetings, clinical care planning, site visits, and a return to work plan, which sets out expectations surrounding medical treatment, physical rehabilitation, and a return to work option. In theory, the worker, union or other representative, the worker's doctors, and the employer are all expected to participate. Advocates for injured workers have found that this crucial part of the case management model is rarely followed.

On May 11<sup>th</sup> 2009, WCB launched a new "Claims Management Solutions" (CMS) system to streamline and manage the claims process more effectively, and improve service to customers. CMS manages all data related to previous, current and future claims and helps integrate services throughout the life cycle of a claim. It may result in faster case handling and claim payments, more support for injured workers, and less administrative work for employers and service providers.

#### **6. Initial Decisions**

Most decisions are made by front line WCB officers. The major issues to be decided are: whether the worker is covered by the WCA; whether the injury arose out of and in the course of employment; and what benefits the worker is entitled to. The most important WCB officers, and the decisions that they make, are as follows:

**a) *Claims Adjudicator or Case Manager***

- Accepts or rejects claim;
- approves wage loss benefits, determines the initial wage rate, and terminates or reduces wage loss benefits;
- investigates and decides “long term” average earnings, which are implemented eight weeks after the injury (10 weeks for injuries occurring on or after June 30, 2002);
- approves or rejects operations or other major treatments;
- approves workers’ expenses for WCB payment; and
- generally makes most decisions involving workers except for vocational rehabilitation services and pension assessments.

**b) *Vocational Rehabilitation Consultant***

- Works with the worker, employer, and union (if any) to get the worker back to work as soon as medically possible, perhaps to a modified job;
- approves job retraining courses;
- determines training allowances (usually paid at wage loss levels) and expenses in attending courses;
- can agree to subsidize a new employer for limited time;
- determines “continuity of income” benefits to bridge the gap between termination of wage-loss benefits and determination of a permanent pension; and
- assesses a worker’s long-term employability, and the earnings he or she is considered capable of achieving after the worker has “maximized” his or her earning capacity in a suitable and available job. This assessment is the core of the Disability Awards Officer’s decision concerning a loss of earnings pension. While the decision is made by the Officer, who can reject the recommendation of the consultant, the consultant’s assessment is a crucial step in the pension process.

**c) *Disability Awards Officer***

- Determines the wage rate for pension purposes. This will usually be the same as the long term wage rate for wage loss benefits. However, the rate is reviewed as part of the pension decision, and can be appealed as part of that decision, even if the wage rate decision was upheld or never appealed at all;
- determines the degree of permanent disability on a physical impairment basis; for workers whose permanent disability is considered to have occurred on or after June 30, 2002, this will determine the pension in the great majority of cases;

- determines the amount of a pension on the projected loss of earnings basis; and
- determines the start date of the pension.

These WCB employees, together with a number of other WCB “players,” interact considerably during initial decision processes. For example, a projected loss of earnings assessment, while made by a Disability Officer, is based on a report from the Rehabilitation Officer stating which jobs are suitable and available to the worker, and what earnings could be anticipated. Throughout a claim, the Board’s salaried medical staff (doctors, psychologists, etc.) are consulted regularly regarding medical issues, and their advice is regularly accepted by the Board over that of the worker’s own family doctor and specialist if there is a dispute.

**d) *The Case Management Team***

- The core team consists of a case manager, a team assistant, a vocational rehabilitation consultant, a claims adjudicator, a medical advisor, a nurse advisor, and a psychologist.
- The external management team consists of the worker, the employer, the union, a specialist, an attending physician, and a continuum provider.
- These two groups are theoretically expected to contribute their perspectives and efforts to resolution of the claim. However, as already noted, the “external team” is rarely given a real opportunity to participate.

**e) *LSLAP Representative’s Role at the Initial Decision Level***

LSLAP representatives may only assist workers with a few formal procedures at the initial decision level. However, the student’s role at this point can still be important. If the initial claim is handled well, appeals may be avoided. These types of inquiries are generally done by correspondence, but may be done in person at the worker’s request.

One important aspect of the CMS data management system is the “portals” which allow workers, employers and representatives to access claim files directly. The worker needs to call the Board and obtain an ID and PIN in order to do this. Once the system is fully operational, such access should allow an advocate or advisor to see exactly how the claim has been handled.

Representatives should obtain a copy of the file and review the relevant documents with the worker. They may also request that the Board provide an opportunity to make submissions prior to the final decision. Some officers will comply with such a request.

It is important to help a client prepare the best possible case at this level. For example, a projected loss of earnings assessment always includes an extensive interview between the Vocational Rehabilitation Consultant and the worker regarding the types of employment that are suitable and available to the worker. The worker should be prepared for this interview, and should be ready to explain issues such as: what he or she is capable of doing, what job activities he or she cannot perform, and why this is the case. The Board rarely decides that a worker is 100 percent disabled, and workers should therefore be discouraged from expecting such a ruling, unless there is very strong medical evidence supporting such a claim.

In addition to filing an appeal, a student can contact the officer who made the decision to request that it be reconsidered on the basis of significant new evidence, or to seek further explanation of the officer's reasons. Note that this must take place within 75 days of the original decision.

Initial decision-making at the Board level is extremely important, and very informal in its procedure. In general, if a representative doesn't understand how or by whom a decision will be made, or what factors will be considered, it is always possible to call the Board and ask. The Claims Manual, Workers' Advisors Office, and other sources of information mentioned in **Section I: Introduction** of this chapter can also help prepare a successful claim. See **Appendix A** for a checklist for a student conducting a client interview.

## 7. Claim Acceptance

If the claim is disallowed, the worker will receive a decision letter outlining the reasons for rejection. If the worker has not received such a letter, the student should contact the Board and request an explanation.

Some common reasons why a claim is rejected are:

- a) the employee waited too long to report to the employer or to apply;
- b) the injury did not occur in the course of employment, or was not caused by the employment;
- c) the injury was due to pre-existing degenerative conditions (such as back injuries); or
- d) the employee did not meet special requirements for "mental stress" injuries under s. 5.1.

Ambiguous medical evidence often leads the Board to decide that the work-causation was not established. Even where the worker's doctor is supportive, the Board will frequently refer the claim to one of its medical advisers, who may disagree with the treating physician's opinion.

## 8. Appeals

A normal appeal (e.g. for a denial of benefits) might take the following route: first, to the Workers' Compensation Review Division of the WCB; second, if necessary, to the Workers' Compensation Appeal Tribunal (WCAT).

**NOTE:** With the adoption of Bill 63, the system of independent appeals and reconsideration powers that enabled the Board to correct almost any decision has been drastically changed. The following is a brief summary of the changes: i) the Review Board, Appeal Division, and Medical Review Panel (MRP) have been eliminated and are replaced with an Internal WCB Review followed by an appeal to the new Workers Compensation Appeal Tribunal (WCAT); ii) decisions about vocational rehabilitation and many pension decisions (where the issue concerns a range of five percent or less in the partial disability assessment) will only be appealed to the internal review process.

### a) *Reopening a Case – Workers' Compensation Board*

**Reconsiderations Are Now Very Limited.** Bill 63, s. 96(2) provides that a decision may be reopened at any time, on application or on the Board's own

initiative, where there has been a recurrence of an injury or a significant change in the worker's compensable medical condition. Applicants seeking to revisit a decision to deny benefits cannot rely on s.96(2), but rather, must appeal to the Review Division.

Section 96(4) does allow the Board to "reconsider" **any** past decision, on its own initiative, but 96(5) prohibits it from doing so if a decision is more than **75 days old** unless there has been fraud or misrepresentation (such as when a videotape may show that the worker is less disabled than claimed). The Board interprets this to mean that the reconsideration must be completed, not just initiated, by the 75<sup>th</sup> day, and staff have been advised that they cannot correct an error of law after that time, or change a decision to give effect to persuasive new medical evidence not available when the original decision was made. In such cases, an appeal to WCAT is the prescribed recourse.

***b) Internal Review - Workers' Compensation Review Division***

A worker, a deceased worker's dependant, or an employer may request a review of any of the following decisions of the Board: i) a decision respecting a compensation or rehabilitation matter (e.g. denial of benefits, or quantum of benefits); ii) a decision levying payment by the employer for negligence or failure to comply with the statute; or iii) a decision respecting an occupational health or safety matter.

The Review Division may also reconsider its own decisions in some cases. It can only undertake such a reconsideration during the first **23 days** after the decision is made, and only if no appeal has yet been filed to the WCAT (Workers' Compensation Appeal Tribunal). The Internal Review Division's powers are slightly greater than the Board's – it can change a decision on the basis of new evidence that didn't exist or couldn't have been presented previously with "due diligence" on the part of the applicant. Even that authority, however, ends on the 24<sup>th</sup> day. This means that for decisions that cannot be appealed to the WCAT, like vocational rehabilitation issues and many pension amounts, there will be no way for anyone in the system to change an incorrect decision based on new evidence, even if it could not possibly have been presented earlier and shows conclusively that the decision was wrong.

***c) Appeal to the Workers' Compensation Appeal Tribunal (WCAT)***

A worker, a deceased worker's dependant, or an employer may appeal most decisions of the Review Division to WCAT.

The following classes or decisions may **not** be appealed to WCAT (ss. 239 and Workers Compensation Act Appeal Regulation, B.C. 321/2002):

- i) Decisions respecting vocational rehabilitation (s.16);
- ii) amount of most pensions, and commuting a pension into a lump sum payment (ss. 23 and 35)
- iii) decisions applying procedural time limits specified by the Board under s. 96(8) of the Act;
- iv) decisions refusing to allow an extension of time to file a request for review (s. 96.2 (4));

- v) decisions relating to the conduct and procedural policies implemented by the Review Division for the internal review (ss. 96.4(2) to (5) and 96.4(7));
- vi) orders by the chief review officer as to whether or not to suspend the operation of a decision pending completion of the review (s. 96.2(5));
- vii) decisions about whether or not to refer a decision back to the Board following completion of the Review Division hearing (s. 96.4(8)(b)); or
- viii) decisions respecting the conduct of a review in respect of any matter that cannot be appealed to the Appeal Tribunal under s. 239(2)(b) - (e) of the Act.

**d) *Limitation Periods and Timing of Decisions***

**The time limit for applying for an Internal Review is 90 Days.** Generally, workers or employers must appeal to the Board's Internal Review officers within 90 days of the WCB decision. This time limit can be extended by the Chief Review Officer if good reason for the delay is shown. Workers who have missed the 90 day limit when they find out they have grounds for appeal should always ask for an extension – they should not give up on their claim.

**Most Internal Review Decisions Must Be Made Within 5 Months (150 Days).** The Act now requires that the internal review officers complete their review of the Board's decision within **150 days** of the date when the request for review was made.

**The time limit for appealing to WCAT is 30 days.** If a worker or employer is unhappy with the outcome of the internal review, they must appeal to WCAT within 30 days.

**Most Appeal Tribunal Decisions Must be Made within 6 Months (180 Days) of Receiving the Claim File from the Board.** This general time limit can be extended by the chief review officer due to the complexity of the matter, a request by the worker or employer, or the need to await a pending decision on another claim raising similar legal or policy issues.

**Direct Appeals from WCB to WCAT.** There are certain types of appeals which go directly to the new Appeal Tribunal without the decision first being reviewed internally. These include appeals over a decision regarding alleged discrimination by an employer against a worker for making a claim, or reporting a safety violation. The 90 day limit also applies to appeals from a decision by the Board to reopen (or to refuse to reopen) a previous decision.

**e) *Policy is Binding***

Section 99 of the WCA states that all decisions “shall be given according to the merits and justice of the case and where there is a doubt as to any issue and the disputed possibilities are evenly balanced, the issue shall be resolved in accordance with that possibility which is favourable to the worker”. However, the Internal Review Division and Appeal Tribunal are legally bound to follow WCB policies, even if they conflict with the merits and justice of the case (WCA, ss.99 and 250). If the Appeal Tribunal's panel feels that a policy is illegal, it must be referred to WCB's Board of Directors for ultimate determination. In effect, these provisions have elevated “policy” to a new form of subordinate legislation.

**f) *Access to Files***

Under the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c.165, all workers have the right to receive a copy of their file. Employers have the right to obtain a copy of the Board's file if an appeal is pending, or a decision is made. A recent amendment to the Act, however, attempts to limit an employer's ability to use this information in non-employment related issues. An employer, for example, may not use the information contained in the employee's file for disciplinary purposes.

An employee's WCB claim file that is disclosed for purposes of an appeal or a Freedom of Information request should contain all of the information pertaining to the Board's decision, as well as copies of any decisions regarding the claim.

Prior to May 2009, a file was divided into various sections such as: Claims, Medical, Accounts, and Memo. Usually the papers were filed in chronological order. Files are organized differently under the CMS data management system. Now, the preferred method of disclosure is by way of an encrypted pdf. file on a CD. The first disclosure will be a complete copy of the file, not just an update.

Overall the adoption of electronic (E-file) rather than paper files has reduced administrative delays due to files being in use by other departments at the WCB or appeal tribunals, but it has also decreased the detailed information explaining how decisions were reached, as handwritten notes and other documents are sometimes omitted. A request for disclosure under the Freedom of Information and Protection of Privacy Act usually results in a more thorough search for such records, and is advisable in cases where all information is needed.

At times, the Board may not disclose all of the relevant evidence in its possession. One reason is that certain departments at the Board, such as the Vocational Rehabilitation Department, keep unofficial sub-files that may not be fully incorporated into the worker's electronic "claim file". Some of the missing information may be helpful for appeals, such as the actual observations of the Board's staff during a functional evaluation, rather than just a final report.

**g) *Appeal Procedure – Workers' Compensation Review Division***

A complete account of the review process goes beyond the scope of this chapter. A good starting point in preparing a review of the Board's decision is to go to [www.worksafefbc.com](http://www.worksafefbc.com) and look for the "Review and Appeal" section, under the "Claims" menu. This is a comprehensive and user-friendly web site which clearly outlines the steps required to make an appeal as well as provides the necessary forms and applications. Limitations as to what kinds of decisions can be appealed, and what persons can appeal them, are clearly stated within this section.

Overall, the appeal process has become much more simplified. To request a review, the worker must complete and submit a two page Request for Review form (available online). This form may be submitted by mail or by fax.

See **Appendix B: Checklist for Review Division Appeals.**

**h) *Appeal Procedure – Workers' Compensation Appeal Tribunal***

Similarly, the best starting point to prepare an appeal to the WCAT is to go to the web site: [www.wcat.bc.ca](http://www.wcat.bc.ca). The "How to Appeal" section of this web site provides information regarding the appeal process, enables access to various appeal forms

and provides internet links to WCAT publications as well as other resources that can assist in the appeal process. Parties applying for reconsideration must write to Tribunal Counsel Office. WCAT will not accept applications for reconsideration by telephone.

***i) Direct Appeals to WCAT***

Certain appeals go directly to the Appeal Tribunal without being reviewed internally. These include decisions regarding alleged discrimination by an employer against a worker for making a claim or reporting a safety violation.

**9. Reconsideration of WCAT Decisions and Judicial Review**

WCAT decisions are “final and conclusive”, but are subject to reconsideration based on statutory grounds and common law grounds. If you are successful, the original decision will generally be found void, in whole or in part, and a WCAT panel will hear the appeal once again.

***a) Statutory Grounds: Reconsideration Based on New Evidence***

Section 256 (3) of the WCA allows for a party to a completed appeal to apply for reconsideration of a decision based on evidence which:

- is substantial and material to the decision, and
- did not exist at the time of the appeal hearing or did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.

If you apply for reconsideration based on new evidence, you must explain:

- why the new evidence is substantial (has weight and supports a different conclusion);
- how it is material (is relevant to the decision);
- whether or not the evidence previously existed; and
- if it did exist previously, why you did not discover (and submit) it at the time of the original hearing.

You will not be able to re-apply based on any new evidence that might become available in the future.

***b) Common Law Grounds: Reconsideration Based Unauthorized Exercise of Authority***

Administrative bodies such as the WCAT have only such authority as is granted to them by statute. Where they purport to exercise authority in a manner that is inconsistent with their grant of authority, the resultant decisions may be reviewable. The tribunal may be found to have exceeded its authority where there have been:

- breaches of the rules of “natural justice” (i.e. procedural defects);

- errors of law with respect to jurisdiction; and
- unreasonable errors of fact, law or exercise of discretion that do not involve jurisdiction.

**NOTE:**

In a recent Supreme Court of Canada decision (*Dunsmuir v. New Brunswick*, 2008 SCC 9) the Court concluded that the distinction between “reasonableness” and “patent unreasonableness” was untenable and so, henceforth, at common law there will be only two standards of review – reasonableness and correctness. It is not clear whether this will affect reconsiderations by the WCAT, since its standard is whether the error is so serious that a court would set the decision aside in a judicial review (see below), and s. 58 of the Administrative Tribunals Act still uses “patently unreasonable” to describe the standard of review applied by the court to a WCAT decision.

(1) The Rule of “Natural Justice” Refers to Fair procedures

In deciding whether there is an error of law going to jurisdiction regarding findings of fact, law, or the exercise of discretion, the test is whether the finding was “patently unreasonable”. Decisions will not be set aside simply because they contain an error of fact, law, or the exercise of discretion, or because they are incomplete in some respect. The error must be one that is “patently unreasonable” or not capable of being rationally supported.

(2) Two-Stage Process of Reconsideration

The first stage results in a formal written decision, issued by a WCAT panel, determining whether there are grounds for reconsideration. If the panel concludes that there are no grounds for reconsideration, WCAT will take no further action on the matter.

If a panel decides that there are grounds for reconsideration, the original decision will then be found void (in whole or in part) and the application will proceed to the second stage at which a WCAT panel will hear the appeal once again. The WCAT will decide whether the second stage will be conducted by oral hearing or written submission.

WCAT has the authority to reconsider both WCAT and Appeal Division decisions. WCAT does not, however, have the authority to reconsider decisions by the former Review Board or the current Review Division. Objections to those decisions will be treated as appeals, or applications for extensions of time to appeal.

It is important not to apply for reconsideration until you are ready to proceed as a party may apply for reconsideration of the original WCAT decision on each ground on one occasion only. WCAT will consider a second reconsideration on common law grounds only when a party is alleging new breach of natural justice related to the previous reconsideration.

In view of the finality of these provisions, especially where a decision has not been appealed, any worker who is not completely satisfied with a decision should request a review by the Review Division and if allowed,

an appeal to the WCAT. This will preserve a residual right to present new evidence in the future, even if the appeal is unsuccessful.

WCAT's Manual of Rules of Practice and Procedure is accessible online at [www.wcat.bc.ca](http://www.wcat.bc.ca). WCAT decisions are accessible at the same web site under "research". If you want to view previous WCAT decisions made on applications for reconsideration, you can select "reconsideration grounds," under "type of decision."

### c) *Judicial Review*

Most advocates feel that it will not prejudice a worker to apply for reconsideration first, and then undertake a judicial review only if the reconsideration application is rejected. In such cases the reconsideration panel would have committed a jurisdictional error by upholding the initial decision, if it was in fact unreasonable. This issue hasn't been addressed yet by the courts, though, and some advocates worry that the test may become even tougher if the WCAT has upheld the decision on reconsideration.

In the past, judicial reviews did not play a large role in workers' compensation. However, Bill 63 eliminated the system of independent appeals and reconsideration powers that enabled the Board to correct almost any decision that was shown to be incorrect. The bill leaves workers with only an internal review by WCB review officials, followed (in some but not all cases) by an appeal to WCAT. Decisions concerning vocational rehabilitation, the amount of most pensions, and commuting a pension into a lump sum payment will not be independently appealable at all—the decision of the WCB's internal Review Division will be final. As a result, there is some indication that courts have become more willing to intervene, given the reduction in the number of possible appeals by workers.

A party may apply for judicial review of a WCAT decision by the British Columbia Supreme Court **within 60 days** of the date on which a decision is issued. Under certain circumstances the court may extend the time for applying. **Possible judicial review cases should be referred to lawyers as it is very difficult to file and conduct a judicial review without a lawyer's assistance.** See **Chapter 20: Public Complaints Procedures** for more information about judicial review.

## 10. **The WCB Chief Complaints Officer (Formerly "Ombudsman")**

The WCB has a Chief Complaints Officer, who has been assigned to deal with issues of alleged unfairness related to the Workers' Compensation Act. A claimant who has a complaint about a decision must first pursue all available routes of appeal. The Chief Complaints Officer may investigate a complaint after all routes of appeal are exhausted. Individuals or groups with complaints about the fairness of WCB decisions, recommendations, actions, procedures, practices, or regulations may contact the WCB Complaints Officer by phone, fax, mail, or in person.

The WCB Chief Complaints Officer should not be confused with the province's Ombudsman, who still has authority to investigate complaints against the WCB. The B.C. Ombudsman's policy is to refer all complaints to the WCB Chief Complaints Officer initially, but a worker who is dissatisfied with the Board's handling of the complaint may still request the provincial Ombudsman to intervene. Advocates are beginning to make more complaints to the BC Ombudsman recently, and students can insist that this be done if the complaint process seems ineffective. See **Chapter 20: Public Complaints Procedures**.

### **III. APPENDIX INDEX**

- A. CHECKLIST FOR WORKERS' COMPENSATION INTERVIEWS
- B. CHECKLIST FOR REVIEW DIVISION APPEALS
- C. SAMPLE AUTHORIZATION BY WORKER OR DEPENDANT FORM

## ***APPENDIX A: CHECKLIST FOR WORKERS' COMPENSATION INTERVIEWS***

- ❑ Obtain basic client information
- ❑ Note WCB claim number
- ❑ Determine worker's claim status:
  - a) Present benefits
  - b) On what basis
  - c) Pending changes
  - d) Relevant decisions
  - e) Pending appeals
- ❑ Review worker's claim in full detail:
  - a) Date of injury
  - b) Nature of injury
  - c) Circumstances of injury
  - d) Client's job
    - i) Remuneration
    - ii) Duties - job description
    - iii) Length of Employment
- ❑ If claim was accepted, determine:
  - a) Initial benefit rate
  - b) Did benefit rate change after 10 weeks?
    - i) Evidence of long-term earnings given to WCB
    - ii) Client's actual work and earnings history
- ❑ Any medical treatment and diagnosis
  - a) Client's position
  - b) Doctor's advice
  - c) Board's position
- ❑ Permanent disability
  - a) Return to previous job
  - b) Return to another job with same employer
  - c) Retraining
- ❑ Long-term loss of earnings?
  - a) Other advisor or representatives
  - b) Workers' advisor? Trade Union? Other?

## ***APPENDIX B: CHECKLIST FOR REVIEW DIVISION APPEALS***

- Interview client
- Review his or her documents
- Immediately take note of time limits applicable – they are always to be adhered
- Contact the WCB for necessary clarification, reconsideration based on new evidence, etc.
- Advise client on alternatives such as an application for reconsideration based on new evidence, keeping in mind that the decision is not more than 75 days old since that would prohibit a Board from reconsidering it.
- File Request for Review application form if instructed by client. Ensure the time limit is met.
- Request copy of file from Board (this can be done before an appeal is filed if time permits).
- Review client's file with him or her
  - a) Any correspondence
  - b) Medical file
  - c) Memoranda
- Identify key issues leading to the decision - examine all aspects
- Research important issues
  - a) Medical - consult family doctor, specialist, etc.
  - b) Policy - read Claims Manual, relevant Reporter decisions, etc.
- Decide on the basic grounds for appeal and relief sought
- Apply for permission to make a late appeal of a related decision, if necessary
- Prepare and gather the evidence
  - a) Client's testimony
  - b) Other witnesses
  - c) Documents:
    - i Medical legal reports
    - ii Affidavits or letters from unavailable witnesses
    - iii Income tax returns, etc.
      - Ask Review Division to subpoena non-cooperative witnesses
- Prepare submissions - do this in writing, as with a trial book
- Hearing
- Receive and review Review Division findings with client
- Consider further appeal to Workers Compensation Appeal Tribunal

**APPENDIX C: SAMPLE AUTHORIZATION BY WORKER OR DEPENDANT FORM**

**AUTHORIZATION BY WORKER OR DEPENDANT**

I, \_\_\_\_\_, residing at \_\_\_\_\_  
(Print Name) (Full Address)

\_\_\_\_\_, \_\_\_\_\_  
(City & Postal Code) (Telephone Number)

authorize the following:

\_\_\_\_\_  
(Print Name/Title of Representative)

\_\_\_\_\_  
(Representative's Full Address/Organization Name)

\_\_\_\_\_  
(Postal Code) (Telephone Number) (FAX Number, if available)

to be my representative respecting Workers' Compensation Board ("WCB") matters, including any review before the Review Division.

I authorize my representative to obtain or view, from any source whatsoever, including records of physicians, qualified practitioners or hospitals, a copy of records pertaining to my examination, treatment history, and employment. For the purpose of reviews, I consent to the WCB disclosing to my representative the contents of my WCB claim file(s) or any other WCB file(s) or related information to which I am eligible to receive disclosure. I further authorize my representative to act on my behalf in providing evidence and submissions in reviews of such WCB files.

I also acknowledge the WCB may obtain or view, from any source whatsoever, a copy of records respecting the matter(s) under review.

This authorization shall remain in effect for two (2) years, or until I revoke it in writing or until my death, whichever is earlier.

\_\_\_\_\_  
Signature of Worker or Dependiant

\_\_\_\_\_  
Date

April, 22, 2003