UFCW local 401
A VOICE FOR WORKING ALBERTA

your voice at work

Edmonton
ph. (780) 452.0362
toll free. 1.800.252.7975
fx. (780) 451.3099
14040 128 Ave.
Edmonton, AB
T5L 4M8

Calgary
Out of town
members call collect
ph. (403) 291.1047
fx. (403) 250.3412
#102, 2635 37 Ave. N.E.
Calgary, AB
T1Y 5Z6

Lethbridge
ph. (403) 328.4245
fx. (403) 320.9288
#104, 3305 18 Ave. N.
Lethbridge, AB
T1H 5S1

Brooks
ph. (403) 501.8486
fx. (403) 501.5144
P.O. Box 1148
631 - A Sutherland Dr. E.
Brooks, AB
T1R 1B9

Fort McMurray
ph. (780) 743.4190
fx. (780) 743.8312
#205, 9914 Morrison St.
Fort McMurray, AB
T9H 4A4

Dental:
1.866.961.6147

Dental (meats):
1.800.667.2816

Safeway PT Benefits:
1.866.544.9686

Superstore PT Benefits:
1.866.342.3513

Pension:
1.888.811.7227

www.ufcw401.ca
ufcw@ufcw401.ab.ca

United Food and Commercial Workers Canada Union, Local No. 401

July 15, 2016

WCB Review, Alberta Labour
c/o Service Alberta Mailroom
11th Floor, Commerce Place
10155 - 102 Street
Edmonton, AB T5J 4L5

RE: UFCW Local 401's Submission

On behalf of UFCW Local 401, please find enclosed a submission for the Workers' Compensation Board review.

We would like to thank the Panel for their consideration of the issues identified herein.

Kind regards,

[redacted]

Keri Grainger
UFCW Local 401
WCB Advocate

KG/mld

JULY 2016

WCB Review, Alberta Labour
c/o Service Alberta Mailroom
11th Floor, Commerce Place
10155 - 102 Street
Edmonton, AB T5J 4L5

RE: WORKERS' COMPENSATION REVIEW/PROPOSED CHANGES/UFCW LOCAL 401

The *Workers' Compensation Act* (WC) is founded on the compromise between employer and worker in that an injured worker gives up their right to pursue civil litigation in exchange for Workers' Compensation Board (WCB) benefits and services to restore their employability. It is thereby inferred the purpose of the *WC Act* is to provide fair and just compensation to persons suffering personal injury as a result of their employment. Over the years, the true intention of the *Act* seems to be muzzled by an over-reaching application of WCB policy that serves to protect the interests of the employer more than the injured worker.

The following submission highlights the difficulties injured workers face in gaining access to just compensation for work related injuries through WCB.

Issue 1: Vocational / Return to Work Services

Background & Rationale:

Current policy and procedure allows for vocational WCB cases to be processed in a cursory fashion. With the policy set up the way that it is, a case manager can use impractical data in order to target a position for employment and then deem an earnings loss supplement on its estimated wages.

For instance, in assessing the suitability and accessibility of the target employment position, the WCB often uses resources, such as: outdated Stats Canada information, ambiguous Can Pages directories, incomprehensive employability databases and over-reaching National Occupational Classification (NOC) job categories. As the data is not reflective of the current job market and is mainly based on theoretical analysis, injured workers find it difficult to find employment in the targeted position.

The end result is that the injured workers avail themselves of any further support because the Board has determined the position and training is suitable. Furthermore, any eligibility to a wage loss supplement is compromised if the target position is not obtained, as the Board does not accept actual earnings unless they are within 10% of the salary of the deemed position.

Optically, it may seem that the motivating factor of the WCB in matters of vocational training is to limit the liability of the employer and of the Board, rather than to assist an injured worker to find meaningful and sustainable employment.

Recommendations:

While WCB policy dictates the agency is responsible for "employability" rather than "employment", it is the recommendation set forth herein to expand the WCB policy to include a vocational planning system that allows for an enlarged focus, one that takes into account the current job market, interests of the injured workers, and a better assessment of their skills, abilities, and interests.

It is also critical to take into account the non-monetary awards the injured worker was entitled to pre-accident and which they may lose upon being forced to pursue alternative employment through vocational services.

These non-monetary awards may include benefits such as health and dental benefits, pension plans, and other benefits, and should be factored into the vocational plan.

Compensation for the above non-monetary awards may take the form of an expanded responsibility for employers, wherein employers might pay premiums based on insurable earnings and the value of the employee's total compensation package.

Issue 2: Maximum Insurable Earnings

Background & Rationale:

The *WC Act* allows the system administrator to calculate wage loss benefits based on the maximum insurable earnings of the employer. In 2015, the cap was set at $95,300 for the purpose of calculating employer premiums. This process denies injured workers their right to full wage loss benefits, and instead places the responsibility of lost income on the injured worker when it is rightfully the liability of the employer. It is our position the only stakeholder benefitting from a maximum insurable earnings cap is the employer.

Recommendations:

WCB should eliminate the maximum insurable earnings cap and base employer premiums on a workers' full gross income. Alternatively, the *WC Act* could be amended to require employers to top up an injured worker directly when their salary exceeds the cap.

Issue 3: Compensation Rate

Background & Rationale:

Currently, injured workers are entitled to receive only 90% of their date of accident earnings through the WCB system.

The most commonly advanced rationale for paying only 90% wage loss is that workers would not be motivated to engage in modified work activity if they are receiving 100% of their wages. This sits uncomfortably for many reasons, but most glaring of all is the illogical pattern of thought that dismisses the process in which fitness for work is determined. Injured workers are obligated to participate in modified work programs when the offer is deemed medically suitable and the duties are reasonable. Current WCB policy dictates that injured workers who chose not to participate in suitable modified work programs are not eligible for wage loss.

Increasing wage loss compensation to 100% of date of accident earnings may in fact lead to better return to work outcomes should employers be required to compensate for the full value of wages.

As is the case with the maximum insurable earnings cap, the only stakeholder benefitting from reduced compensation for wage loss of date is the employer. If the right to sue their employer is taken away by the *Act*, then injured workers should retain their right to recover 100% of their earnings when a workplace injury is sustained.

Recommendations:

Injured workers should not have to experience any disruption to their earnings when they are unfortunate enough to have to claim a work related injury and should be entitled to 100% of their date of accident earnings.

As proposed in our recommendations for Maximum Insurable Earnings (above), it is our position that legislation should require employers to top-up the additional 10% of earning loss directly to the injured worker so that the WCB is not further financially burdened and the employee not experience any wage loss.

In a user-pay insurance system, by having employers directly top-up injured workers with the additional 10% of their wages (rather than through the WCB), the overall financial impact on the compensation system is maintained.

Issue 4: Dispute Resolution and Decision Review Body

Background & Rationale:

The Workers' Compensation Act provides for an internal review and an external appeal for both adjudicative decisions. WCB suggests they are committed to a review and appeal process that ensures that decisions are compliant with *WC Act* and WCB polices.

In 2014-2015, 43% of appeals forwarded by the Dispute Resolution and Decision Review Body (DRDRB) to the Alberta Appeals Commission had outcomes that were either reversed or varied. This large percentage of appeals reflects the bias inherent in the DRDRB process.

Additionally, reviews at the DRDRB level typically proceed in a documentary review fashion. In our experience, requests for in person appeals, primarily in Calgary, have extensive wait times. We find that this has been the result of either of a lack of resources (i.e. available review specialists) or the employer wishes to participate and they are given far too much leniency in terms of their availability.

Recommendations:

The DRDRB needs better resources to allow in person hearings to proceed in a timely manner. It is our recommendation that the legislation requires the DRDRB to standardize the timelines from the date they are advised the appeal is to proceed in person to the time the appeal is actually heard. It is our position the appeal should be scheduled and heard within two weeks (10 business days).

In an appeal where the injured worker is the appellant, it is not appropriate to allow the employer/employer representative to delay proceedings beyond one week (5 business days) because of scheduling conflicts.

Although the DRDRB describes itself as an independent appeal body offering an impartial review of a claim, in practice it is not always the case. For example, hearings are held at the WCB office and review specialists work closely amongst the case managers and adjudicators whose decisions they are tasked with reviewing.

It is our recommendation the DRDRB be modeled after the current structure of the Office of the Appeal Advisor, which acts independently of the WCB. To introduce legislation that dictates an arms length relationship between the DRDRB and the WCB would increase the outward perception of impartially.

Furthermore, it is known that review specialists are typically hired from within the organization; it is our recommendation to broaden the hiring pool to consider external candidates for the position in order to strengthen the impartial review process.

Issue 5: Ongoing Review of the *WC Act*, WCB Policy and Legislation

Background & Rationale:

The last comprehensive review of the workers' compensation system in Alberta was conducted more than 15 years ago. Currently, there is no statutory requirement in the *WC Act* to conduct a review of the workers' compensation system within a specific time period. This needs to change. Amendments to the legislation are necessary to ensure proper governance of the compensation system.

Recommendation:

A comprehensive review of WCB policy and procedure to occur every four (4) years by a committee comprised of employers, workers, union representatives, and the appropriate government officials and bodies.

Issue 6: Section 61 of the *WC Act*, Recurrence of Disability

Background & Rationale:

Under current legislation, the Board may accept a recurrence of disability and pay compensation from the date of the recurrence based on a worker's current earnings.

In such instances, part of the criteria that must be met is that the worker had been considered recovered and more than 12 months has elapsed since the date of the accident.

Recommendations:

Each case should be judged on its own merits to ensure fair compensation to those who suffer a recurrence of disability at an earlier point in time than the 12 months currently required in the legislation.

Alternatively, WCB policy needs to address the fairness of the application of Section 56 of the *WC Act* when injured workers are deemed permanently disabled and thus, the criteria set forth in Section 61 is not met. In our experience, an injured worker may continue with their date of accident employer in a modified capacity for an indefinite period of time. In the event the employer is no longer able to offer the accommodation, the injured workers' vocational benefits are based on Section 56 earnings rather than current earnings, thereby creating a financial hardship for the injured worker.

It is illogical to support injured workers who experience a recurrence of disability and yet fail to adjust earnings in cases where an employer determines permanent modified work is no longer available.

The WCB does not enact any section of the *WC Act* to fairly compensate injured workers who find themselves in this circumstance, nor does their policy reflect any intent to do so.

Issue 7: Duty to Accommodate

Background & Rationale:

WCB has no real legislative authority in Duty to Accommodate legislation except to motivate an employer financially. We feel it is of utmost importance to keep an injured worker job attached when it is their desire to do so. Many of our Union Members have a stake in their employment by way of pension and compensation packages, and social benefits that contribute to quality of life.

Injured workers in Alberta are largely unprotected (except in unionized environments) from employers who simply do not want to deal with workplace disabilities. The compensation system is founded on a principle

that prevents injured workers from suing their employers, yet the *WC Act* cannot protect employees from employers willing to sever ties all too easily due to worker disability.

Recommendation:

Certainly, there need to be provisions in the *WC Act* that authorizes the WCB to enact Duty to Accommodate legislation to ensure employers are complying to the fullest extent.

Issue 8: Medical Reviews

Background and Rationale:

Medical reviews are more common in claims that are more complex in nature (i.e. pre-existing conditions) or in matters relating to a causal relationship when it is not easily identified.

Most commonly in the medical review process, the WCB medical consultant, who is an in-house medical practitioner paid directly by the WCB, provides documentary reviews of claim issues. In more complex or adversarial matters, typically independent medical examiners (IMEs) are employed to provide opinions on causation and treatment recommendations. They are also asked to comment on the validity of an exam based on objective performance and behavioral measures.

The WCB engages these medical consultants to "assist" in the matters of entitlement. In practice, it seems the medical opinions obtained by the Board trump all others, even if said opinions are vague, conflicting or incomprehensive. WCB seemingly accepts these adverse opinions without question and uses these reports as justification for closing a claim. The onus is then on the worker to submit new evidence to support a medical conflict.

The Board's direct access to the medical consultants is troublesome when compared to the level of access workers have to the medical examiners and to the review process itself.

In some cases, matters involving a medical consultant review may be successfully resolved by engaging the treating doctor, as both opinions should be weighted equally. In our experience, it is much easier for a worker to find and access a general practitioner than a specialist.

Particularly troubling are opinions made by way of an independent medical examination. An adverse outcome poses a significant barrier to an injured worker with the burden of proof effectively transferred to the claimant. Due to the fact IMEs are conducted by a specialist, injured workers are only able to advance medical conflict when they are able to obtain a second opinion of a similarly qualified practitioner and are forced to use public health avenues to do so. This becomes a tedious process for an injured worker without income.

The *WC Act* provides opportunity for an appeal of adverse claim decisions but outcomes are based on the weight of medical evidence. The barriers injured workers face in gaining access to specialists independent of the WCB creates an unfair appeal process because the evidence weighs more heavily in favour of the WCB without a second medical opinion produced by the claimant.

Recommendations:

We take issue with the degree of "independence" found in the independent medical exams performed by contracted medical specialists. The impression of assessments performed at the WCB office may lead to the presumption of bias in favour of the Board. It also presents a conflict of interest on the part of the WCB. It is therefore our recommendation that such assessments be held at a neutral location and that the Board establish easier access to medical panels rather than hiring one independent medical examiner. The medical panel

should have an equal distribution representing the interest of all stakeholders involved and wherefore the interests of the worker are advocated.

We also find the following measures should be standard protocol in medical reviews necessary to determine eligibility for benefits:

1) Complex entitlement decisions should always involve an onsite critical job summary before a decision is made. This service ensures medical opinions are based on an accurate functional assessment of the injured worker's job duties versus information provided by the employer. This includes such information as a physical demands analysis (PDA), which in our experience is often unrealistic and/or outdated. We also find PDAs do not always accurately reflect the working environment at the time the injury occurred.

(2) In claims reviewed by a WCB medical consultant, input should always be sought from the injured worker's treating physician prior to determining entitlement, rather than rendering an opinion and a subsequent claim entitlement decision before the practitioner becomes actively involved.

(3) Requests for Alberta Health Care records requests should be standard practice when there is evidence to suggest an aggravation of a pre-existing condition.

4) WCB medical consultants need to be more forthright in commenting or recommending additional information that would allow for a comprehensive overview of all available evidence to ensure fair and just entitlement decisions.

Issue 9: Psychological Benefits

Background & Rationale:

Current WCB policy allows for psychological injuries (i.e. "stress" claims) to be investigated as a result of either chronic or acute stress in the workplace. Typically, acute stress is more easily identifiable as it is defined as involving a single, traumatic event (i.e. witnessing a bank robbery), whereas cases of a chronic nature are subject to rigorous scrutiny and the onus of proof is solely placed on the injured worker.

More often in chronic stress claims, WCB policy dictates that work related events must be "excessive or unusual in comparison to the normal pressures and tensions experienced by the average worker in a similar occupation". This policy effectively bars claims caused by an adversarial organizational culture and disallows many legitimate sources of stress from being accepted (i.e. bullying or discrimination).

Precluding compensation for psychological work related injuries because human beings experience degrees of stress differently is inconsistent within the intended purpose of the compensation system. Furthermore, the Board tends to dismiss psychological claims (particularly in chronic cases) as interpersonal workplace conflicts that are outside of the Board's jurisdiction. The WCB asserts they will not be involved in labour relations matters and as such these cases are dismissed as either a human rights or labour relations concern.

Recommendations:

The management of psychological injuries is different than the management of physical injuries. It is our position the WCB lacks resources, particularly in cases of Post Traumatic Stress Disorder (PTSD), which is often misinterpreted as malingering and results in inappropriate adjudicative decisions that serve to worsen an injured worker's circumstances.

WCB needs a specific claim process that is proactively managed by staff that is trained to recognize the unique process of development and recovery with psychological injuries. Failure to do so subjects injured workers to administrative errors that are inappropriate and harmful to their overall health and well-being.

WCB needs to refrain from subjecting injured workers with psychological injuries to such rigorous scrutiny. Policy should allow cases to be determined on the merits of benefit of doubt when a physiological diagnosis is confirmed. Current practice requires the injured worker to prove the treatment against them is excessive which is difficult to do when interpersonal conflict is excessive but not public or overtly displayed in the workplace.