

MAKE IT SAFE, MAKE IT FAIR

The case for tougher workplace safety

*A submission to
government by
the B.C.
Federation
of Labour*

April 2007



Make it safe, Make it fair

INTRODUCTION

Every worker assumes they will return home to their family at the end of the workday safe from workplace injury. The provincial government is responsible for ensuring the workers' compensation system delivers on this very basic commitment.

Unfortunately, every year thousands of BC workers and their families have a very different experience.

In 2006

- 160 workers died from a work-related accident or disease; including
 - 12 workers between the ages of 15 and 24;
 - 22 forestry workers and 39 construction workers;
 - 61 workers who died from occupational disease; and
 - 4,723 workers were permanently injured as a result of a workplace accident.

The drastic changes made by the provincial government to the **Occupational Health and Safety Regulation (OHSR)** and the **Workers' Compensation Act (WCA)** in 2002 eroded the government's commitment to protect workers' health and safety and provide fair compensation for workers injured on the job.

Regularly, British Columbians hear that BC's economy is booming. Finance Minister, Carole Taylor, estimates a provincial surplus of \$12 billion over the next four years. A booming economy places workers' health and safety first.

This Report outlines the devastating impact the government's 2002 workers' compensation changes have had on workers in British Columbia and calls on the government to act immediately and place workers' safety and fair compensation for injured workers at the top of the government's priority list.

Make it Safe

On April 28th, the International Day of Mourning, workers, labour organizations and governments around the world pay tribute to workers killed and injured on the job. Every year we collectively commit to improving the health and safety record for the next year so that the pain and tragedy of workplace deaths is not repeated.

Preventing workplace injuries and fatalities takes a focused commitment on all of our parts and requires dedication to three main principles:

- clear and precise health and safety rules;
- strict enforcement of the rules; and
- significant consequences for employers who do not comply.

Clear and Precise Rules

Beginning in 2001, the provincial government moved in the exact opposite direction, cutting resources, deregulating health and safety rules, introducing many more generic regulations and guidelines, and allowing employers to self-regulate. Performance-based regulations are open to interpretation and make it very difficult for Board Officers to enforce. Self-regulation says to employers that it is up to them how they make the workplace safe. For many employers, especially small operators, the lack of specific direction and few resources to hire health and safety

specialists to assist with a health and safety program makes it very difficult for them to comply with the regulations.

Six years later, it's clear: the government's approach to deregulation has simply not worked. **The First Aid Regulations**, for example, were one of the first requirements deregulated. The Coroner's inquest investigating the death of Ted Gramlich, a Vancouver Island faller, cited the weak First Aid Regulations as one of the contributing factors in Mr. Gramlich's death and recommended that the 2002 **First Aid Regulations** be reinstated. The Workers Compensation Board (WCB) has acted on the Coroner's recommendations and is proposing to reinstate the first aid regulatory language. We applaud the WCB for taking the steps necessary to implement the Coroner's recommendations and return the **First Aid Regulations** to a more prescriptive regulation.

Also, the 2006 and 2007 health and safety public hearings agenda shows that the Board is beginning to move away from deregulating the health and safety regulations towards more specific rules. Changes proposed to regulations governing working alone, needles and sharps, infectious diseases, and the requirement for mandatory young worker training and orientation shows the Board takes seriously what rules are required to protect workers' safety to the fullest. This is critical if we want to reduce the number of workplace injuries and fatalities.

We ask that the Board continue in this direction. This must include removing phrases, such as "where feasible," "where practicable," or "must consider" language that leaves the regulation open to interpretation and makes it difficult for Board Officers to require employers to implement the regulation as it was intended.

Recommendation:

1. The government support the WCB to implement a prescriptive regulatory system in which each regulation clearly states to employers and workers what is required to make the workplace and/or specific work processes safe, and how to go about implementing the requirements.

Strict Enforcement of the Rules

Clear precise regulations are necessary to protect workers' safety, but must be accompanied by strict enforcement in order to be effective.

2001-2005

WCB statistics show clearly the shift away from enforcement between 2001 and 2005.

Table 1 shows that over the five-year period inspection reports decreased by 30 percent, orders by 20 percent and penalties imposed by 54 percent.

Table 1 - WCB Enforcement Activity

Year	Inspection Reports	Orders	Penalties	Penalty Amounts
1997	35,894	54,137	366	\$2,545,776
1998	31,661	48,072	256	\$1,528,220
1999	34,264	54,001	211	\$1,244,579
2000	31,063	51,150	238	\$1,288,648
2001	28,648	42,865	202	\$1,745,625
2002	22,015	34,168	138	\$1,764,200
2003	16,310	24,176	135	\$ 620,324
2004	15,913	23,092	103	\$1,833,157
2005	20,267	34,128	93	\$1,840,162
2006	25,920	46,163	73	\$1,500,000

Table 2 shows that over the same time period the number of employers increased by nine percent, but the number of Officers declined by 19 percent.

Table 2 - Number of Employers, Officers and Workers

Year	Number of Employers	Number of Officers	Number of Employers/ Officers	Number of Workers
1997	156,233	174	898	1,860,500
1998	161,770	185	874	1,858,400
1999	164,963	167	988	1,894,400
2000	166,501	205	812	1,931,300
2001	169,650	205	828	1,921,600
2002	171,583	203	845	1,965,000
2003	173,008	180	961	2,014,700
2004	179,257	155	1156	2,062,700
2005	184,239	166	1110	2,130,500
2006	188,164	194	970	2,195,500

2006

The numbers for 2006 indicate that WCB enforcement activity increased within the year, however, inspection reports and penalties imposed (Table 1) are still not to the 2001 levels. Comparing 2006 levels with 2001, we see that despite the fact that the number of employers between 2001 and 2006 increased by 11 percent (Table 2) inspection reports declined by 10 percent and penalties imposed declined by 64 percent. The number of orders written did increase by 8 percent, which may well be as a result of the two enforcement "blitzes" the Board carried out in 2006.

The lack of employer compliance and the need for a Board Officer presence on the worksite is clearly demonstrated by three recent enforcement blitzes initiated by the Board in the forestry sector, in gas stations and on farm labour contractors transporting workers to jobsites. It is shameful that it took workplace fatalities in all three of the sectors to motivate an enforcement crackdown: 43 forestry deaths, three farmworkers and one worker working alone at a gas station late at night.

In March 2006, the Board inspected 300 forest industry worksites and wrote 650 compliance orders for violations of the **WCA** and the **OHSR**. This after a record number of deaths in the forestry sector in 20 years. The enforcement initiative revealed clearly not only the employers' lack of compliance, but also their failure to accept responsibility for creating a safe work environment, even though the industry had just experienced a record number of fatalities and serious injuries in 2005.

Similarly, the Board's blitz of gas bars and service stations inspected 366 gas stations and found the vast majority of employers were not in compliance. This, after months of publicity about the workplace death of gas station worker Grant DePatie killed in March 2005, and the need for stricter regulations governing late night operations.

The Board's most recent enforcement blitz occurred in March 2007, following the fatal van crash and the death of three farmworkers. Spot checks were conducted for nine days by a joint team including WCB Officers, the RCMP, and the inspectors from the Ministry of Transportation. More than 180 vans were inspected. Sixty-seven vans or 37 percent failed to meet safety standards. The failures included 51 vans, which had mechanical violations, 18 failed because of load security violations and nine vans failed because the driver did not have the correct class of licence.

We were shocked to learn that Kevin Falcon, Minister of Transportation, found the results "troubling" but "wasn't particularly surprised..." That Minister Falcon suspected these violations to be taking place in the industry and did nothing to ensure the law was enforced is unacceptable.

It took three workers deaths and 14 seriously injured workers to put in place the joint inspection team. Unfortunately, to date the government has only committed to the joint inspection approach for the short term. It is critical that the government re-instates the joint compliance team on a long-term basis and commits the resources necessary for the team to do its work in a comprehensive and effective manner. Furthermore, the Federation submitted to the government a report on the farmworker situation and made 29 recommendations that if implemented would ensure a much higher level of safety for farmworkers being transported to work, and working in the fields and greenhouses. We call on the government to implement the recommendations immediately.

1997 - 2006

Ten years ago WCB's enforcement activity was more rigorous. The current approach is more relaxed and relies heavily on employer self-regulation. Table 1 shows that between 1997 and 2006, inspection reports declined by 28 percent, orders decreased by 15 percent, penalties decreased by 80 percent and penalty amounts decreased by 41 percent.

During the same time period the number of total fatalities stayed roughly the same; however, young worker fatalities are at a record high and increasing by 20 percent and permanent injuries increased by 12 percent (Table 3).

Table 3 - Number of fatalities and permanent injuries

Year	Number of Fatalities	Number of Permanent Injuries	Number of Young Worker Fatalities
1997	164	4217	10
1998	125	3239	4
1999	147	2525	9
2000	156	3796	6
2001	168	4001	5
2002	157	4962	5
2003	170	5252	9
2004	134	4640	9
2005	188	5263	11
2006	160	4723	12
Total	1,569	42,618	80

The numbers speak for themselves. Clear rules and strict enforcement ensures greater employer compliance and prevents workplace injuries and fatalities. The three enforcement blitzes conducted by the WCB reveal very clearly that self-regulation does not work. Left to themselves, many employers do not comply.

Recently, the Ontario provincial government, which made drastic cuts to their enforcement activity in the 1990s, adopted an enforcement strategy that included hiring an additional 200 Enforcement Officers. Their particular function is to inspect select high-risk industries four times a year until the workplace health and safety system improves, and injury and illness rates are lowered. We believe the provincial government and the WCB must take a similar approach.

Recommendations:

1. Direct the WCB to commit the resources required to increase the 2006 Officer staffing levels by 100 full-time positions.
2. Direct the WCB to implement stricter enforcement rules including vigilant inspections of high-risk employers not in compliance;
3. Direct the WCB to require employers to act on orders issued within the time frame given and shut down employers who refuse to do so, especially in high hazard industries and/or where a fatality has occurred; and
4. Make Coroner's Inquests mandatory for all workplace fatalities.

Consequences for Non-Compliance

Preventing workplace injuries and fatalities requires not only clear and precise regulations and strict enforcement, but also strict and real consequences for employers who do not obey the rules. As Table 1 indicates, the number of penalties imposed on employers between 2001 and 2006 declined significantly by 64 percent and the penalty amounts declined by 14 percent. The ten-year snapshot, 1997-2006, shows that the number of employers increased 20 percent and yet penalties declined by 80 percent and penalty amounts by 41 percent.

This decline in penalties sends a clear message to employers that there likely not to be any real consequences for defying health and safety laws. Employers must know that the regulations are there for a reason: to protect workers' health and safety and not obeying the rules will not be tolerated.

Recommendations:

1. Direct the WCB to impose a mandatory penalty for any fatality or serious injury resulting from non-compliance;
2. Direct the WCB to impose mandatory penalties for repeat offenders; and
3. Direct the WCB to implement penalty amounts that act as a real and meaningful deterrent to employers not complying with the regulations.

Compensation: Make it Fair

Over the last five years, workers have experienced in a very significant way the provincial government's reduction in workplace safety. The increased number of permanent and serious injuries over the past six years portrays this most clearly. While the government abandoned their responsibility to protect workers' safety on the job, so too they have abandoned their financial responsibility for injured workers.

Legislative Changes Hit Pensions the Hardest

The government's most drastic changes were the cuts to the **WCA** that eliminated lifetime pensions and dramatically decreased workers loss of earning pensions and gave employers a one-time savings of \$1 billion.

Loss of Earnings Pensions (LOE)

The value of injured workers' pensions (Permanent Disability Awards) has declined dramatically. In 2002, under the old legislation, the average pension award was \$34,000. In 2005, under new legislation the average value of a pension award was \$24,000. This is a 30 percent decrease.

This is so for several reasons. First, the calculation of the pension award under the old legislation was based on 75 percent of the worker's **gross** wage rate and under the new legislation is based on 90 percent of the workers **net** wage rate.

Secondly, the old legislation provided a dual system, which gave the WCB the discretion to implement the pension,

permanent functional impairment award or a loss of earnings pension, most equitable for the worker.

It was intended that a worker's permanent partial disability be compensated based on the difference between the pre-injury earnings of the worker and the earnings that the worker is earning, or is capable of earning, after the injury.

Section 23(3.1) of the current **WCA**, as amended in 2002, states that the worker may receive a loss of earnings pension only if:

"The worker's disability resulting from the injury is so exceptional that the amount determined under Sub Section 1 does not appropriately compensate the worker for the injury."

The WCB Policy #40.00 reduces the possibility of receiving a loss of earnings pension even further by defining "so exceptional" in a very restrictive manner.

Policy #40.00 directs that if a worker retains specific skills, which are essential to the occupation, then the assessment process under Section 23(3) simply ceases. In other words, the disabled worker would only be eligible for a permanent functional impairment award, not a loss of earnings award. "Skills" are defined by the policy as the learned application of knowledge and abilities.

One need only look at the actual number of loss of earnings pensions awarded under the old legislation as opposed to the new legislation to get the picture of the impact. In 2002, under the old legislation, 927 loss of earnings pensions were awarded, in 2006 that number had dropped to 39. This change alone gave employers \$78 million savings annually.

How the Changes in Legislation Affect Injured Workers

The changes made to the **WCA** in 2002 have had a very significant and harsh economic impact on workers injured on the job. Comparing the pension benefits received by an injured worker under the old legislation and new legislation shows this most clearly.

Old Legislation

On June 20, 2001, John, a 49-year-old technical field cable representative, was permanently injured when he jumped over a fence and landed on uneven pavement causing a fracture of his right ankle. This injury led to a subtalar fusion of the right ankle. John's injury left him with a 7.72 percent permanent functional impairment.

As a result of the injury, John was unable to return to his former job. Unfortunately, despite vocational rehabilitation assistance, the best alternative employment he was able to find was with the pre-injury employer in a trouble shooter position. As a result, John was no longer able to access regular overtime and commissions. The new job paid \$3,500/month.

John's wage rate was set at maximum for 2001, \$4,875 per month. His Permanent Functional Impairment (PFI) was assessed at 7.72 percent, which resulted in a PFI monthly pension of \$282.26.

According to Section 23.3 of the old legislation, John was considered to have maximized his earnings potential with the new job. Consequently, he was entitled to a loss of earnings pension of \$1,031.25 per month rather than just the Permanent Functional Impairment award of \$282.26 per month. Essentially, under the old legislation he did not experience a loss in his income as a result of his injury.

New Legislation

Had John been injured after June 30, 2002, the situation would have been very different. Table 4 indicates clearly the dramatic impact of the new legislation.

Table 4 – Old and New Legislation

	Pre June 30, 2002	Post June 30,2002
Max. wage rate	\$4875	\$4875
Calculation of wage rate	75% of gross wage rate	90% of net wage rate
Permanent functional impairment	7.72% = \$282.26/month	7.72% = \$246.65/month
Return to pre-injury employer - different job	<ul style="list-style-type: none"> • \$3500/month • lower income than pre-injury job therefore LOEs pension awarded 	<ul style="list-style-type: none"> • Retained learned application of knowledge therefore not eligible for loss of earning pension
LOE pension Age 49-65	\$1031.25/month = \$197,952	<ul style="list-style-type: none"> • Not eligible
PFI pension Age 49-65		\$246.65/month = \$47,356.80
Post 65	Worker continues to receive loss of earnings	<ul style="list-style-type: none"> • Pension ends • Retirement benefit 5% of total PFI received
Total received age 65-75	\$123,750	\$2,367.84

First, his monthly PFI pension would be less, \$246.65 per month, as the wage rates are now based on 90 percent of net.

The trouble-shooter job with the accident employer is considered to be one that utilizes the same specific skills, which are essential to the field technician occupation. So this worker has retained the "learned application of knowledge and abilities" and therefore he cannot be considered for a loss of earnings pension even though his earnings have been affected.

Under the new legislation John would only receive his PFI pension of \$246.65 per month payable until age 65, a total of \$47,356. And, because of the drastic cuts to the **Act**, John would lose \$150,596 of income from the age of injury, 49 to retirement at age 65. Unfortunately, this is the current experience for thousands of injured workers injured after June 2002. In 2002, there were 927 loss of earnings pensions awarded. In 2006, this dropped to 39.

What if John had not maintained the "learned application of knowledge and abilities" of the same or similar occupation? Under the new legislation, there is another "test" the worker must pass in order to be considered for a LOE. The vocational rehabilitation consultant now completes a transferable skills analysis and determines if the worker could access other suitable work, within his PFI-related restrictions. If two occupations are identified for which the worker still holds skills, then a review of the average earnings for those two occupations is completed. These earnings are then compared with the occupational average for the worker's pre-injury job (not his actual earnings in that job) and a decision is made whether any loss of earnings anticipated would be "significant."

Also, it's important to note that dramatic changes were made to Vocational Rehabilitation in 2002. Changes to the **WCA** eliminated workers' right to appeal any vocational rehabilitation decisions. Changes to Board policies further restricted the level of vocational rehabilitation available to workers. This change is clearly demonstrated by the sharp decline in vocational rehabilitation expenditures since 2001. In 2001, \$117 million was spent. In 2004, there was a dramatic decline to \$15.5 million and in 2005 a further decline to \$1.5 million.

In short, these complex new processes have made the system less understandable for the worker and they do not fairly compensate for losses incurred. Policy #40.00 clearly states "while a worker may experience a loss of earnings as a result of a work injury, that fact alone is not sufficient to meet the test set out under Section 23(3) and (3.1)."

We believe that if a worker experiences a loss of earnings as a result of a work injury, the worker should be compensated for that loss. The use of a complex and ever-narrowing doorway for loss of earnings consideration clearly penalizes injured workers and leaves them with the potential for significantly reduced incomes as a result of their work injury.

Under the old legislation, the application of the dual system process resulted in an outcome for the worker that truly compensated for any loss of earnings. We are not saying that the old system was perfect. However, it was more understandable when there was a dispute, and the injured worker received a more balanced outcome.

We recognize the WCB is currently reviewing the Board's policy on loss of earnings pensions and the Federation looks forward to contributing our views to the discussions.

Loss of earnings, however, requires more than a policy change. To achieve the appropriate outcome for injured workers, legislative change is needed.

Lifetime Pensions

The 2002 cuts to the **WCA** not only reduced the pension levels for injured workers, but also eliminated lifetime pensions. Under the old legislation injured workers received their pension for life. In John's case he would have received \$282.26 per month for life and the pension would be indexed annually. Under the new legislation the pension ends at the age of 65 and the worker receives a retirement benefit equal to five percent of total pension amount received prior to retirement plus interest.

The legislative changes made in 2002 to pensions cost a worker in John's situation \$150,596 over a 16-year period. The elimination of the lifetime pension penalized the worker further. As Table 4 shows over the next 10 years, age 65 to 75, John would lose an additional \$121,382. The effects of the workplace injury stays with a worker for his lifetime, not just to 65.

Recommendations:

1. Section 23(1) (b), 23(3.1) of the **WCA** be repealed and be replaced by a provision that requires the Board to pay the worker the amount of compensation calculated under Section 23(1) or Section 23(3), whichever is greater; and
2. Section 23.1 to 23.5 of the **WCA** be repealed and replaced with a pension payable for life.

Employers, not workers, benefit from legislative changes

In 2002, the government reduced benefits for injured workers stating that the workers' compensation system was financially unsustainable. A review of the period 1997 to 2005 shows that the WCB was effectively fully funded. The unfunded liability in 2002 was an anomaly and within actuarial norms.

The government also claimed the compensation benefits levels were not sustainable due to the effect it had on employers' assessment rates. The truth is the assessment rates were decreasing up to 2002 when the government made the legislative changes. As well, the Board has realized major surpluses over the years. Between 2003 and 2005 alone, the Board had surpluses totalling more than \$837 million.

The cost savings resulting from the compensation cuts and the Board's surpluses have resulted in a major reduction in employers' assessment rates. According to Sid Fattedad, Chief Financial Officer, WorkSafeBC, in 2007 the average rate for employers in BC is the lowest rate any time in 30 years, and is among the lowest in Canada.

Employers, not workers, have been the true benefactors of the government's cuts to compensation benefits, especially loss of earnings pensions and lifetime pensions.

A one-time savings of \$1 billion and an annual savings of \$78 million resulting from the cuts say it all.

Clearly the workers' compensation system was financially sustainable in 2002 when the government made the cuts to the system.

Recommendation:

1. The government must restore the compensation benefits to injured workers as well as direct the WCB to use a portion of their annual surpluses to resource a comprehensive and stringent enforcement strategy.



JIM SINCLAIR
President



ANGELA SCHIRA
Secretary-Treasurer

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RECOMMENDATIONS

1. The government support the WCB to implement a prescriptive regulatory system in which each regulation clearly states to employers and workers what is required to make the workplace and/or specific work processes safe, and how to go about implementing the requirements. (Page 5)
2. Direct the WCB to commit the resources required to increase the 2006 Officer staffing levels by 100 full-time positions. (Page 10)
3. Direct the WCB to implement stricter enforcement rules including vigilant inspections of high-risk employers not in compliance. (Page 10)
4. Direct the WCB to require employers to act on orders issued within the time frame given and shut down employers who refuse to do so, especially in high hazard industries and/or where a fatality has occurred. (Page 10)
5. Make Coroner's Inquests mandatory for all workplace fatalities. (Page 10)
6. Direct the WCB to impose a mandatory penalty for any fatality or serious injury resulting from non-compliance. (Page 11)
7. Direct the WCB to impose mandatory penalties for repeat offenders. (Page 11)
8. Direct the WCB to implement penalty amounts that act as a real and meaningful deterrent to employers not complying with the regulations. (Page 11)
9. Section 22 of the **WCA** be repealed and be replaced with the Section 22 language of the 1993 **WCA**. This action would ensure injured workers receive adequate pensions after retirement. (Page 17)
10. Section 23 of the **WCA** be repealed and replaced with the Section 23 language of the 1993 **WCA**. This action would reinstate fair consideration for loss of earnings. (Page 17)
11. The government must restore the compensation benefits to injured workers as well as direct the WCB to use a portion of their annual surpluses to resource a comprehensive and stringent enforcement strategy. (Page 18)