Submission from:

The Public Service Alliance of Canada, Prairie Region

To:

The Workers Compensation Act Legislative Review Committee 2016

February 15, 2017

Public Service Alliance of Canada
Alliance de la Fonction publique du Canada

We would like to thank the Workers Compensation Board of Manitoba (WCB), and the Workers Compensation Act Legislative Review Committee 2016 (LRC) for the opportunity to share our thoughts on how to ensure *The Workers Compensation Act* (the *Act*) is up to date, and ensure it meets the needs of all involved.

As representatives of the Public Service Alliance of Canada (PSAC), we are involved in representing our members when they have questions or concerns with a WCB claim. In Manitoba, our union represents over 8,000 members, primarily in the federal sector and covered under the *Government Employees Compensation Act*. These members work in a wide variety of fields, including: revenue, agriculture, corrections, health, airports, environment, and defense. However, many of our 8,000 members are covered under provincial legislation, such as those working at Deer Lodge Centre, the University of Winnipeg, Brandon University, and the Centre for Aboriginal Human Resource Development.

As part of our role in representing workers, we help our members understand and navigate the complicated claims process. We also assist members in filing claims and working through the appeal process. Through this work, we have identified a number of areas where changes can be made to improve user experiences. This includes cases where the WCB must adapt to new workplace realities and ensure those that are entitled to coverage receive the support they need to safely return to the workplace when able.

In this submission, we would like to provide our input on a number of issues highlighted by the experiences of our members, ensuring consistency with the Meredith Principles, the mandate of the LRC, and the discussion paper titled, "Past, Present and Future: Workers Compensation in Manitoba."

Claim Suppression

Unfortunately, it is still all too common for employers to use a variety of tactics to suppress WCB claims—thus influencing their premiums—as opposed to taking preventive measures to prevent workplace injuries from occurring in the first place. Claim suppression is a foreseeable outcome of the experience rate model of calculating premiums. Based on the experiences of our members, this claim suppression happens through a variety of methods, including:

- Encouraging members not to file claims.
- Threatening members with forms of discipline—including termination—should they file a claim.
- Aggressively appealing WCB claims, reducing the number of claims against the employer and drastically reducing the length of claims, with no involvement in preventive measures.
- The increased use of third party claims management companies, whose sole purpose is fighting all WCB claims.

- Establishing financial bonuses and incentives based on WCB claims. In particular, the Royal Canadian Mint on Lagimodière Blvd provides a 2 percent bonus to employees if a predetermined number of claims is not attained. This encourages workers to pressure others not to report injuries, or incidences that may cause future injuries.
- Many workplaces have not established safe return to work procedures, meaning many members are pressured to return to work, contrary to the opinion of the attending physician, or the input of the employee affected.

This may be even more prevalent in certain workplaces, including: those with precarious employment; those with workers who are new Canadians; those with workers who speak English as a second language; and those with other vulnerable employees. There needs to be a greater incentive for employers to improve the health and safety in their workplaces, and not suppress claims. As it stands, it is often more cost effective for an employer to suppress a claim as opposed to providing a safe and healthy workplace. There is very little focus on prevention of injuries, with more emphasis placed on being reactive once injuries have occurred.

The most straight forward way to achieve this would be providing stronger incentives and benefits to employers that improve the health and safety of their workplaces. There should be greater penalties for employers that do not participate in providing a safe and healthy workplace for employees. There should also be greater penalties for employers who practice any form of claim suppression. There is language in the *Manitoba Workplace Safety and Health Act* that is currently not being enforced. We also welcome a change from the experience rate model, which can encourage claim suppression.

"The Petrie Report," an independent external review in 2013, highlighted some of these concerns, as well as the extent and seriousness of the issue. In an effort to be brief, it is our expectation that the LRC refer to this report when performing their review.

Psychological Health

Psychological health and safety in the workplace has always been a concern, and we believe that psychological injury claims are not adjudicated as equitably as physical injury claims. Recent estimates show almost half of all lost time incidences are due to psychological injuries.

While physical, repetitive strain injuries can be covered under WCB, inability to work due to persistent bullying, harassment, belittling behaviour, or other workplace stressors are not currently covered under WCB. This highlights the gap and inequalities between psychological and physical claims, which many jurisdictions have begun to address, including British Columbia.

We believe that this differential treatment is unfair. It is already more difficult to come forward with psychological health issues due to the stigma still attached to mental health issues. It is also more difficult to receive treatment for psychological injuries, as opposed to physical injuries, due to the availability of care and support. Additionally, it

can be more difficult to comprehend complicated processes, such as WCB claims, when dealing with mental health issues. Add to those challenges the discriminatory treatment of the WCB to these injuries, and it creates an even more challenging situation for workers suffering from psychological health issues.

We fully support "CSA Standard: Psychological Health and Safety in the Workplace." The workplace stressors outlined in this guideline clearly identify workplace issues which contribute to the psychological health of the people in the workplace. The guideline identifies actions that can improve the health and safety of the workplace, and provides attainable steps employers can take to implement. It also highlights factors that can contribute to psychologically unhealthy workplaces.

Should Manitoba WCB endeavor to remain a modern, responsive, administrative tribunal, now is the time to make the necessary changes to current practices.

As with the "Petrie Report" and claim suppression, in an effort to brief, it is our expectation "CSA Standard: Psychological Health and Safety in the Workplace" be referenced when the LRC performs their review.

Cap on Insurable Earnings

In consultation item six of the discussion paper titled, "Past, Present and Future: Workers Compensation in Manitoba," the following question for discussion is asked: *Should Manitoba have a cap on the maximum insurable earnings within the workers compensation system?*

We firmly believe that any cap on the insurable earnings would be considered discrimination against higher earning workers. Any deviation from this model would act as a deterrent for workers injured in the workplace to file WCB claims. WCB should continue to apply the same calculation to all workers and not institute a cap on insurable earnings.

The last WCB review in 2004/2005 acknowledged the unfairness of a cap. All claims should be subject to the same standards. It is referenced in the discussion paper that all other provinces have a cap on insurable earnings. In those provinces, the problems with a cap have been highlighted. PSAC also has members in Alberta and Saskatchewan where it has been proven that a cap provides a distinct disadvantage for workers. In those provinces, workers dealing with a workplace injury and recovery are also subjected to coping with a system that covers them less than other workers earning a different salary. If Manitoba wants to be considered a progressive, modern, and responsive province, this should not be a consideration.

The Minister has gone on record as saying that the intent is not to curtail any payments to injured workers, but posing a cap for discussion puts that statement into question. We are proud to say Manitoba is progressive and non-discriminatory, as the only Canadian jurisdiction that does not have a cap on insurable earnings. It must stay that way.

Medical Opinions

When our members have come to us with concerns regarding their WCB claims, the issue often predominantly surrounds the information that their doctor has provided not being given proper weight. In these instances, a doctor who has never met with the claimant often provides their opinion based solely on the notes provided.

Medical professionals have become increasingly unwilling to be involved in workplace injury cases, due mainly to the fact that their opinions are not being trusted and considered, and they are frequently overruled. These are medical professionals that care for their clients, but are so disenfranchised with the process that they see no point in putting the effort forward. It is the claimant who suffers when they do not get the support from WCB that they need. The WCB system can easily be perceived as unfair when the medical information provided is discounted in favour of the WCB-employed doctor.

It is also unclear how WCB decides which medical opinion to accept when making a determination on a claim. In the view of the claimant, WCB sides with their own doctor when presented with conflicting information, and discounts the medical information of the claimant's doctor. This often occurs even though the claimant may have been a patient of the doctor's for years or decades prior, with the doctor having a full understanding of the claimant's medical history. This is also prevalent when physiotherapists or chiropractors are involved. The opinions of professionals who work closely with the claimant on a regular basis are being discounted by a medical professional who has never been in contact with the claimant. This process is inherently wrong and needs to be addressed.

We're also concerned with the WCB's increasing reliance on medical consultants to monitor and often cease coverage based on a short meeting, again discounting the information and opinion provided by medical professionals with intimate knowledge of the claimant's medical history. Not only is the medical opinion being discarded, the decisions made also affect whether the claim will continue.

As with the WCB-employed doctors, the opinions of the medical consultants must also be viewed as a conflict, and certainly not an unbiased opinion. The weight of the opinion of the consultant must automatically be taken with a grain of salt as these medical professionals are reliant on the WCB as their source of income. The question of the impartiality the medical consultant's opinion must be addressed in order to maintain a fair, balanced, and objective system.

A January 6, 2017 *National Post* articled titled, "Hired gun in a lab coat: How medical experts help car insurers fight accident claims," highlights the issue being raised. A copy of this article is attached to this submission. Though the article is specific to the automobile insurance industry, the issues raised are also prevalent within the WCB.

The practice of medical consultants providing opinions on claims is increasingly being scrutinized, based primarily on the objectivity of the consultant. Similar to claims management companies suppressing claims, it appears that the primary role of the medical consultant is to deny claims, or to cut short claims that have been approved. This results in a savings of money for the insurer, in this case WCB. Instead of paying claims, insurers are paying medical consultants to deny claims, or rush a person back to work when all the other medical information suggests the claimant has not yet sufficiently recovered. This creates an adversarial relationship that is clearly biased against the claimant.

It is clearly the opinion of workers that the system is slanted against them, and we agree with that viewpoint. This is not consistent with the Meredith Principles.

From our experience, and the observations made in the *National Post* article, a worker who is abusing the system is unlikely to proceed with a claim through all the steps of the appeal process. It is more likely that a claimant that does not have income protection, yet has supporting medical information, will follow through with the appeal process. The vast majority of legitimate claims are being treated as though they are fraudulent. The experiences of a very small number of fraudulent claims are tainting the process for the vast majority of legitimate claims.

Employer Advocacy Office

We do not see the value in the creation of an Employer Advocacy Office. As it currently stands, employees have very little resources available within the WCB system. Our unionized members enjoy the support of the union and its benefits, which they pay for through union dues. Non-unionized employees do not have this option, thus the creation of the Employee Advocacy Office. This office has been created to ensure the balance in the system, following the Meredith Principles.

However, should an Employer Advocacy Office be established, the balance once again shifts in favour of the employer. Employers already have control over the workplaces and a general awareness of the issues. Employers should have staff in place dedicated to providing support for WCB claims. They have the resources to contract out these services. It is clear through our experiences that employers are increasingly using third party claims management companies to fight claims at the earliest stages and throughout the process.

In a 2014 review, Saskatchewan rejected the creation of the Employer Advocacy Office, primarily due to the fact it was not consistent with the Meredith Principles, among other reasons. We would instead recommend providing further support to the under-resourced Employee Advocacy Office, which would provide a greater contribution to a balanced system.

Should WCB wish to be consistent with the Meredith Principles, and be seen as a modern, responsive, administrative tribunal, the Employer Advocacy Office should not be created. The establishment of such an office would only create an even more adversarial relationship.

Closing Comments

We would like to thank the LRC for the opportunity to provide our opinions. We commend the LRC on the goal of adhering to the Meredith Principles, and reviewing changes to address current issues. We look forward to the opportunity to further share our opinions after the LRC has addressed these initial steps.

Should you require further clarification, please contact us at any of the coordinates below.

Thank you,

Marianne Hladun
Regional Executive Vice-President, Prairies
Public Service Alliance of Canada
460 – 175 Hargrave St.
Winnipeg, MB R3C 3R8
Email: hladunm@psac.com
Office: 204-956-4625
Cell: 204-805-4536

Clint Wirth
Regional Representative, Health and Safety
Public Service Alliance of Canada
460 – 175 Hargrave St.
Winnipeg, MB R3C 3R8
Email: wirthc@psac.com
Phone: 204-947-1601
Fax: 204-943-0652

NATIONAL POST

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Hired gun in a lab coat: How medical experts help car insurers fight accident claims

By Tom Blackwell

The car accident victims, the doctors who testified against her and the judges who aren't accepting their expertise-for-hire - how insurance...

In the years after being rear-ended in a car accident, Liese Bruff-McArthur saw a small army of medical professionals. Most agreed the crash had left her with chronic pain, depression, PTSD and other troubles, making a return to work untenable.

Then she met Dr. Monte Bail.

Hired by the insurance company she was suing, the psychiatrist spent an hour and a quarter with the Ottawa-area woman - the kind of work that earned Bail as much as $77,000 a month - and concluded Bruff-McArthur was essentially faking it.

After listening to the doctor's testimony late last year, a jury awarded the motorist nominal compensation, which meant she would actually get nothing.

But then a judge did something unusual, castigating Bail for biased, invented evidence in the "guise" of being a medical expert. A few months later, a different judge cited that case and others and refused to even let the psychiatrist examine another accident victim.

"Dr. Bail ... fell far short of his obligation to be fair, objective and non-partisan," wrote Justice Paul Kane at the Bruff-McArthur trial. "(He) was not a credible witness."

In personal-injury lawsuits that are by nature adversarial, "independent medical examiners" like him are supposed to be above the fray - highly regarded professionals who assess patients impartially.

But the decisions critiquing Bail were among a series in recent years to paint many of those doctors and other experts as "hired guns" whose appraisals inevitably give insurers what they want - a reason to deny the injured benefits.

Most of the cases have escaped public attention. But the issue came to the fore this month when a judge tossed out the libel suit filed by another doctor/assessor, siding with the lawyer who accused the physician of massaging the facts to help his insurance-company client.

A string of written judgments suggests the doctor's alleged bias was anything but unique in the insurance world.

Ontario physiatrist Dr. Rajka Soric – an expert in physical medicine and rehabilitation – was repeatedly criticized as recently as this year for acting as an "advocate" for insurers; psychiatrist Dr. Stanley Debow was accused by a judge this January of stepping "way outside of his area of expertise" to help the company that hired him.

It's clear from the (reported) cases that it is far too prevalent.

A judge in Calgary last year flatly rejected the testimony of a neuropsychologist testifying for an insurance company.

"Dr. (Paul) Green is blatantly biased against plaintiffs," said Court of Queen's Bench Justice Kristine Eidsvik. "This bias taints and discredits everything Dr. Green had to offer to the court."

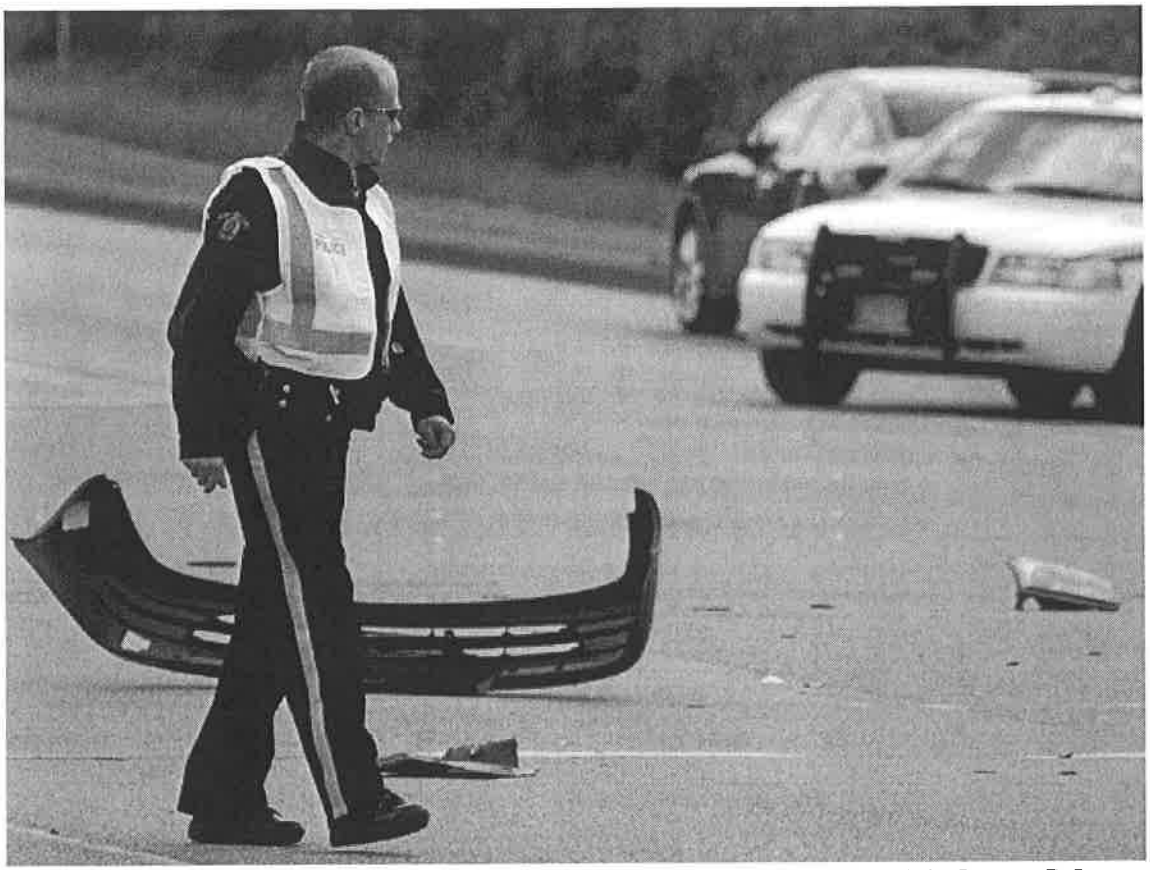
And such cases are likely just the tip of the iceberg, say lawyers representing accident victims, the plaintiffs. Judicial criticisms arise only in the five per cent or so of cases that get to trial, they note, so most instances of bias stay under wraps as lawsuits are settled out of court.

"It's clear from the (reported) cases that it is far too prevalent," says Adam Wagman, a plaintiff lawyer and president of the Ontario Trial Lawyers Association. "That attacks the very foundation of our system of justice."

Handout Liese Bruff-McArthur shortly before the car accident that led to a personal-injury trial last year. A psychiatrist who said Bruff-McArthur's account of her injuries shouldn't be believed was blasted by the judge for being biased in favour of the insurer that hired him.

For claimants like Bruff-McArthur, there are more than just principles of justice at stake.

If an expert concludes an injury doesn't exist, that motorist can be denied funding for rehabilitation or lost income, often essential to resuming a normal life, says Rhona DesRoches, who runs Ontario's Association of Victims for Accident Insurance Reform.



Eric Dreger / The Canadian Press Police investigate the aftermath of a car crash in Surrey, B.C. on Sunday, April 28, 2013.

A biased expert witness raises "the potential for a miscarriage of justice," said the judge who refused to let Bail examine a patient.

But the psychiatrist himself says he's been unjustifiably attacked by the courts, arguing he does assessments almost exclusively for insurers simply because lawyers for the other side don't take him on.

If his opinions usually align with the insurance company that employed him, Bail said, it's only because he's asked to examine a minority of cases that have already raised suspicions.

"To have your reputation impugned in that way ... it's not right, it's a major unfairness in my mind," he said about Kane's comments. "I'm not partial to the insurance side ... If I find that what the patient is saying is true, I really go to bat for them, and I don't care if that lawyer will ever hire me again."

While almost all the judicial criticism has been leveled at doctors retained by insurance companies, even lawyers who represent victims admit there is a roster – though smaller – eager to help their side, too.

A 2011 court ruling in Ontario, for instance, concluded Dr. Darrell Ogilvie-Harris, an orthopedic surgeon, was acting not as an impartial expert but as an advocate for the injured plaintiff in the case.

> You have good experts, you have bad experts ... and you have a system that is working very hard to try to end the use of experts who are biased in one way or another.

As for experts testifying for insurers, their alleged bias for the company signing the pay cheque is often just a perception, based on the fact they do most of their assessments for the defence, argues Eric Grossman, an insurance-side lawyer.

"You have good experts, you have bad experts ... and you have a system that is working very hard to try to end the use of experts who are biased in one way or another," he said.

Regardless of who's paying or how that might influence opinions, there is certainly lots of work, with insurance companies handling 364,000 auto claims and dispensing $2.3 billion in accident benefits in 2013, the most recent year reported, according to the Insurance Bureau of Canada (IBC).

And IBC statistics for one province, Ontario, suggest insurers can spend more on medical assessments than actual injury compensation: $10,700 vs. $9,700 per average claimant in 2011.

Companies typically demand an independent exam in two scenarios: where people sue their own insurer to obtain no-fault benefits they've been denied, or sue the at-fault driver's company for more damages.

The experts' remuneration can be generous.

Dr. Soric made $450,000 in 2015, mostly from assessments for insurance companies, and yet "incredibly" still believed she could be seen as neutral, a judge commented at a trial this June. Dr. Lawrence Reznek, another psychiatrist, revealed in a 2013 case he spends 25% of his time on assessments - mostly for insurers - but the income is double what he earns from his clinical practice the rest of the time.

"There are no shortage of doctors who are looking for sources to augment their income, and this has been a very lucrative one," said Grossman.

The industry says it has good reason to have experts scrutinize injury claims. Companies estimate that auto-insurance fraud costs hundreds of millions of dollars a year, some of it involving elaborate staged collisions that trigger phony health-care claims, with networks of health providers in on the scams.

And the cases where expert opinions become critical typically involve chronic pain, soft-tissue injuries like whiplash, or psychological problems - issues that can't be decided with an X-ray or other physical evidence.

But Brenda Hollingworth, Bruff-McArthur's lawyer, argues fraud is rare among those who actually sue, saying that drawn-out, stressful litigation makes for a lousy get-rich-quick scheme.

"The benefits for a standard policy are so low, why would you give up a job, even if you're only earning $35,000, to earn $19,000?" asks Jokelee Vanderkop, who described her own auto-insurance travails in a book, So You Think You're Covered - the Insurance Industry Rip-off.

Bail did 5,500 assessments during his 25 years in the business, charging as much as $5,000 each and performing seven to 14 a month, he testified at Bruff-McArthur's trial last year. All but "a few dozen" were for insurers.

And for almost two decades, some adjudicators have accused him of having a pro-insurance bias. Judges in 1999, 2004, 2007 and 2014 called him an advocate or partisan for his insurance clients.

None of that prevented Bail from testifying last December about Bruff-McArthur, saying he did not believe the car crash had caused her any psychological problems, and that the woman's account of her injuries was not credible.

The judge devoted nine pages to explain why he was rejecting Bail's evidence, then concluded the plaintiff's claims were "strongly supported" by several other witnesses.

Bail notes bitterly that the assessment work has dried up since. He complained about the judge to the Canadian Judicial Council, only to be told Kane had a right to his opinion.

How to solve the hired gun problem

The law already says doctors and other health workers should never become "hired guns" for insurance companies or patients in personal-injury cases. But it still happens, judges say. Here are some ideas being proposed to address the problem:

Transparency: Track and make public experts' histories as insurance witnesses: how often they've done assessments, for which side and what judges said about them. At least then, they could be properly assessed themselves.

Videotaping: Require medical assessments to be recorded, ensuring the expert's final report reflects what happened in the interview.

Hot-tubbing: Adopt this colourfully named system where experts from both sides meet and produce a joint report, outlining areas of agreement and disagreement. Developed in Australia, it's received good reviews in the U.K. recently.

Three strikes, you're out: Bar from the witness stand experts who are repeatedly exposed as partisans for the side that hired them.

Discipline: Regulatory colleges should be more aggressive and proactive in policing members who are criticized for biased assessment work.

Less outside assessing: Accident victims' claims should be based largely on their own doctors' opinions, as

"This work is so adversarial, I don't even like doing it, really," says the psychiatrist. "Maybe it's a blessing in disguise. Maybe it's a relief not to do these any more, because it's just not worth the aggravation."

happens when someone applies for coverage under workplace health insurance.

Meanwhile, the judge's comments - made in response to a legal motion - were little more than a moral victory for Bruff-McArthur, pregnant at the time of the crash. The jury had already delivered its verdict: a $23,000 award that fell below the minimum threshold for damages in such cases.

Bruff-McArthur would get nothing- and be on the hook for the insurer's likely massive legal costs, too.

An appeal is under way.

• *Email: tblackwell@nationalpost.com*[1] | Twitter: TomblackwellNP[2]

References

1. tblackwell@nationalpost.com
2. twitter.com/tomblackwellnp

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