Submission of the Alberta Construction Association, July 21, 2020

(responses in italics)

1. Background

General Information

Which industry sector(s) does your organization operate in?

- Agriculture
- Mining and Petroleum Development
- Business, Personal and Professional Services
- Public Administration, Education and Health Services
- Construction and Construction Trade Services
- Retail and Wholesale Trade Services
- Forestry
- Social Advocacy Organization/Group Manufacturing and Processing Transportation, Communication and Utilities Accommodation and Food Services
- Other (please specify):

I would consider our organization to be:

- An employer
- An employer/industry association or employer advocacy group
- A labour organization/association, union or worker advocacy group
- Other

If you have chosen "other", please specify:

2. Benefits

2.1 Maximum Insurable Earnings Cap

1. What are your views on the maximum insurable earnings cap?
2. Should a maximum insurable earnings cap:
   - Not apply (status quo),
   - Be reintroduced, or
   - Be reintroduced with modifications.

Please explain your preference and indicate your reasons. If "modification" is chosen, please share your suggested changes.

ACA recommends reinstatement of a cap on Maximum Insurable Earnings. The previous cap of 90% of net pre-incident earnings up to$98,700 net earnings was far higher than Alberta's average gross wage of $58,000. The WCB Alberta formula provided for a cost of living adjustment to ensure the MIE covers the full wage of 90 percent of workers covered in the province and partial coverage for the remaining 10% of workers. Member firms indicate that earnings above $98,700 per year typically are earned by employees that are not employed in the field which therefore (a) face fewer risks than field staff, and (b) are

frequently covered by employer disability benefits programs. Hence employers' premium costs have increased significantly with correspondingly limited financial benefit for their employees. The WCB Review's actuarial assessment concluded that removing the cap on maximum insurable earnings had at $17 million per year, the largest increase to employer premiums of the various benefit changes recommended by the Review (page 186). Moral hazard under insurance refers to the likelihood that the insured's behavior changes in a manner that increases the likelihood of a claim. Insurance deductibles are used to reduce moral hazard. Removing the cap on maximum compensable earnings in effect reduces the "deductible" and incents risky behavior. The removal of the maximum earnings cap therefore further undermines the principles of WCB as an insurance program.

2.2 Cost of Living Adjustments for Worker Benefits

1. What are your views on linking the cost-of-living adjustments to the Alberta Consumer Price Index?
2. Should the cost-of-living adjustment calculation:
    - Remain as is (status quo),
    - Return to pre-2018, or
    - Be modified.

Please explain your preference and indicate your reasons. If "modified" is chosen, please share your suggested changes.

ACA supports a return to pre-2018. Work prepared for the Bank of Canada suggests that the CPI overstates actual costs of living. Actual expenditures reflect consumer decisions to substitute lower priced goods than that priced in the CPI basket of goods.

2.3 Presumptive Coverage for Traumatic Psychological Injuries

1. What are your views on presumptive coverage for workers who have experienced traumatic events at work and are then diagnosed with a psychological injury or illness?
2. Should presumptive coverage for psychological injuries be:
    - Maintained (status quo),
    - Removed, or
    - Modified.

Please explain your preference and indicate your reasons. If "modified" is chosen, please share your suggested changes.

ACA does not support any expansion of presumptive diseases. Implementation of presumptive diseases coverage contradicts the fundamental tenets and responsibilities of the WCB to make decisions based on evidence, policy, and a fair, impartial and transparent process.

Mental health: Presumptive coverage for psychological injuries should be removed.

With respect to mental health, a significant challenge is how to determine pre-existing non-occupational condition versus a workplace injury. Further, interpersonal conflict with supervisors or coworkers can pose as depression or anxiety, but are not in themselves reasons to certify workplace injury claims. The WCB needs to be able to clearly define the incident time, date of occurrence and employee reporting of the occurrence before randomly accepting a claim as a workplace incident. As with all other claims, there has to be a clearly defined incident. Very clear parameters and clear and unequivocal cause/effect

relationships between work and the mental/emotional illness must continue to be shown. Mental health diagnosis reveals little about the degree of impairment. The worker has an obligation to report the incident and the facility has an obligation to provide the necessary care including reassigning the worker to other duties to protect from an accumulative injury. Mental/cognitive/emotional illness MUST be treated the same way. Non-work-related personal barriers should always be serviced by other government and social services, not WCB.

2.4 Continuation of Employer Paid Health Benefits

1. What are your views or your organization's experience with the requirement to continue employer paid health benefits for up to one year after a worker's injury?
2. Should the requirement for continuation of employer paid health benefits be:
    - Maintained (status quo),
    - Removed – not a requirement, or
    - Modified.

Please explain your preference and indicate your reasons. If "modified" is chosen, please share your suggested changes.

ACA recommends removing the requirement for continuation of employer paid health benefits. Government imposed this increased cost on employers beyond the mandate of the Workers' Compensation system.

Given the transient workforce in Construction, the requirement to continue employer paid health benefits up to one year after a workers injury could be more than what the same individual would have been entitled to if they were not injured, ie. They "gain" employee entitlements. The transient workforce is often In and out benefits depending on the work available.

2.5 Interim Relief Benefits

1. What are your views on interim relief benefits?
2. Should interim relief benefits from WCB:
    - Remain as is (status quo),
    - Return to pre-2018 practices, or
    - Be modified.

Please explain your preference and indicate your reasons. If "modified" is chosen, please share your suggested changes.

If interim relief is to remain, ACA recommends reimbursement of interim relief that subsequent adjudication does not support the claim. Otherwise, non-payment of unwarranted interim relief incents employers and workers to appeal every decision. The cost implications are potentially enormous.

3. Return to Work

3.1 Employer Obligation to Reinstate

1. What is your experience or your organization's experience with the current requirement for an employer to reinstate an injured worker as outlined in section 88.1 of the Act?
2. Should the employer obligation to reinstate be:

- Maintained (status quo),
- Removed,
- Exempt small employers from the requirement, or
- Other.

Please explain your preference and indicate your reasons. If "other" is chosen, please share your suggested changes.

Bill 30 introduced Part 5.1, section 88.1: Obligation to Reinstate Worker and section 88.2 Continuation of employment benefits. These additions were made despite an acknowledgment in the WCB Review that nearly 94% of injured workers return to their date-of-accident employer (WCB Review, page 70). Section 7 of the Alberta Human Rights Act already provides this protection as "(1) No employer shall (a) refuse to continue to employ, or (b) discriminate against any person with regard to employment or any term or condition of employment, because of physical disability". Under 7(3), (1) does not apply with a refusal…based on a bona fide occupational requirement". Introduction of Part 5.1 changes the WCB from a no-fault insurance program designed to assist workers remain employable with their post-accident limitations to a fault-based social program of employment irrespective of hardship to the employer. 40% of construction employees work for firms of 20 employees or less, rising to 76% in firms of 100 employees or less. The vast majority of construction firms are small businesses that operate project to project, often in remote locations. They do not have sufficient resources to create an occupation to accommodate a worker. 88.2(8) for the purpose of determining a workers entitlement to an employment benefit under which the worker is deemed to continue to be employed for one year after the date of the accident also discriminates against uninjured workers for which no such guarantee exists in construction's project based work. 88.1 and 88.2 reduce employer funds to keep their existing uninjured workforce employed. Adding a less productive position at the expense of a productive position in a 20 employee shop reduces gross revenue by as much as 5%. Many construction firms operate with margins of less than 5%. These small businesses also lack the administrative support to work through 2 separate statutory obligations.

The mandate of the WCB is to return a worker to employability not actual employment and this aspect of the system must be retained. The obligation to reinstate should be removed.

3.2 Termination of Modified Work

1. What are your views on continuation of WCB benefits for workers whose employment was terminated while on modified duties? Please share any suggestions (indicate your reasons)?

   Bill 30 introduced section 56(14) which states: "if the worker is subsequently terminated or the work is withdrawn by the employer, the Board shall pay compensation for temporary total disability until the Board determines the worker is capable of other suitable employment." The previous Government introduced this change despite recommendation 24 from the WCB Review Panel (page 75) that: "The WCB, meanwhile, needs the authority to adjust a worker's benefits if they are terminated while on a return to work program. To the extent necessary, the Workers' Compensation Act should be amended to enable the WCB to look at all relevant facts, determine whether a worker was terminated for egregious conduct, and adjust the worker's benefits accordingly." Prior to the change to the Act, with no change in the wording of the relevant policy, the WCB informed employers in 2013 that the WCB adjudication would not be affected by employment relations, in effect, extending the no-fault principle to situations where workers on modified duties had been

terminated for cause. The Appeals Commission subsequently overturned the WCB's decision to provide benefits in a number of appeals. ACA doubts that Justice Meredith considered modified duties over one hundred years ago as he formulated the principles of workers compensation. A thorough analysis is contained in the attachment prepared by McLennan Ross. Workers continue to have the right to pursue unjust termination through Human Rights legislation, and WCB benefits can be reinstated should Human Rights find the termination was without cause. ACA believes there are significant unintended consequences should WCB benefits continue where employee behavior such as unsafe behavior, theft or violence results in termination for cause. OHS legislation enshrines the principle of internal responsibility, ie. All parties share a responsibility to ensure workplace safety. Section 56(14) contradicts the direction from the legislature enshrined in the OHS Act.

ACA recommends the WCB Act should be amended to enshrine the principle that no-fault does not extend to post-incident behavior that in effect removes the worker from the course of employment and hence entitlement to disability benefits.

4. System Sustainability

4.1 Accident Fund Surplus Allocation

1. What are your views on distribution of Accident Fund surpluses to employers?
2. Should WCB's Policy on Accident Fund surplus distribution:
    - Remain as is (status quo),
    - Return to pre-2018 state (distribution to employers), or
    - Other.

Please explain your preference and indicate your reasons. If "other" is chosen, please share your suggested changes.

ACA strongly urges a return to pre-2018, that is, Accident Fund surplus distribution be returned to employers. We remain opposed to diversion of any surpluses in the Accident Fund for purposes other than which they were collected (i.e. funds collected in any given year are intended to cover current and future costs of claims in the given year). It is our view and that of several other governments, most recently British Columbia, that surpluses in the Accident Fund should go back to employers, and that these funds do in fact represent "employer money". Employers of today appropriately have an obligation to fund current and future costs of today's claims. However, when money collected, including interest earned on premiums collected, exceed what is required the Board has an obligation to return the surplus to employers from whom the premiums were collected. This was discussed at great length with stakeholders when the Funding Policy was changed prior to 2018 and it was agreed that investment income should not be part of rate setting and instead any surplus would to go back to employers. ACA recommends the WCB Act be amended to explicitly state that surpluses of the Accident Fund belong to employers.

5. Process and Governance

5.1 Appeals Commission Reconsideration Process

1. What is your view on timelines for the appeal and appeal reconsideration process?

2. Should the process for reconsideration of appeal decisions:
    - Remain as is (status quo),
    - Return to pre-2018 practices, or
    - Be modified.

Please explain your preference and indicate your reasons. If "modified" is chosen, please include suggested changes.

ACA recommends a return to pre-2018 practices. The WCB Review under the previous Government provided little evidence of the need for change. Bill 30 essentially added red tape by adding costs without any substantiated need.

5.2 Appeals Commission Time Limit

1. What is your view on timelines for appeals of DRDRB decisions?
2. Should the appeal timelines:
    - Remain as is (status quo),
    - Return to pre-2018 practices, or
    - Be modified.

Please explain your preference and indicate your reasons. If "modified" is chosen, please include suggested changes.

ACA recommends a return to pre-2018 practices. The WCB Review under the previous Government provided little evidence of the need for change. Bill 30 essentially added red tape by adding costs without any substantiated need.

5.3 Benefit of the Doubt Provisions

1. What are your views on the benefit of the doubt provisions? Are there any suggestions for changes to the requirements, while ensuring protection for workers (indicate your reasons)?

Determining a causal relationship (link) between an illness/injury and the workplace is necessary for all claims made to the WCB. It is the WCB's administrative responsibility to investigate all the evidence provided, apply the law and render a decision. In recognition that not all situations are straightforward, the "Benefit of Doubt" policy is fair and reasonable when considered within the context and interpretation provided, and when properly applied. However, it is imperative this not be use as a substitute for lack of evidence, or in a purely speculative sense, or when the issue can be decided on the balance of probabilities.

In order to accept a claim, the WCB must establish a nexus between a work activity being performed and the injury/illness. To facilitate timely and accurate adjudication, the involvement of the employer is essential prior to an entitlement decision being made. The evidence based determination must support that the claim arose during employment and is related to employment duties, not simply that the incident occurred in a workplace. The purpose of employer consultation would be to ensure the WCB has all the relevant information the employer is aware of regarding the worker, the workplace and the work duties. Adjudicators must understand the actual work the injured worker was performing at the time and conduct a thorough investigation into both current medical and pre-existing conditions. This consultation step in complex claims will avoid situations where an entitlement decision is made based on an assumption by the WCB rather than fact, and minimize the need for an employer

appeal because not all information was considered. Employers must also be afforded sufficient time when dealing with complex claims to obtain expert medical opinion where warranted.

5.4 Health and Safety Association Oversight

1. Please share any suggestions on oversight of health and safety associations. Please indicate reasons for your response.

   Funded safety associations were driven by the employer community, with ACA creating the first with Alberta Construction Safety Association in the 1980s. The levy collected was not a consequence of Justice Meredith's work establishing the principles of workers compensation. The current oversight by Boards of Directors comprised of employers and other stakeholders is appropriate. WCB should reinstate its formal process to annually confirm employer support to fund the safety associations to ensure appropriate accountability of funded safety associations to employers. Employers who are not satisfied with the action or role of their Safety Association would have the ability to express their concerns at the time continued employer/ industry support is being sought. There is no role for government oversight of the work of funded safety associations.

5.5 Occupational Disease and Injury Advisory Committee

1. What are your views on the need for the committee to review the occupational diseases contained in the WC regulation?

   Alberta is the only jurisdiction that legislates a body like ODIAC.
   The WCB Review and subsequent Bill 30 of the previous Government changes the WCB from a no-fault insurance program designed to assist workers remain employable with their post-accident limitations to a fault-based social program of employment irrespective of hardship to the employer. Taken together these changes over time will dramatically increase employer administration and claims costs.
   These changes include:
   - *Policy Rec. 27 WCB examine the use of predominant clause and its impact to ensure it does not create an unreasonable threshold for eligibility (p.84) implemented via: Policy 02-01 Part II Arises out of and Occurs in the Course of Employment Policy 03-01 Part II App. 6 Psychiatric or Psychological Injury*
   - *Rec. 28 amend the Act to provide that where there the disputed possibilities are evenly balanced on an issue, the injured worker receives the benefit of the doubt (p.85) implemented via 17(4.1) If the evidence in support of the opposite sides of an issue related to a claim for compensation is approximately equal, the issue shall be resolved in favour of the worker.*
   - *Rec. 29 amend the Act to establish an Occupational Disease and Injury Advisory Committee to advise on potential changes to Schedule B (occupational diseases) of the WC Regulation (p.86) implemented via 24.3 – establishes ODIAC whose purpose is to propose recommendations to Minister respecting amendments to Act or regulations relating to occupational diseases*
   - *Rec. 30 amend the Act to enable the Appeals Commission to take note of commonly-seen linkages between certain injuries or illnesses and certain types of employment (p.87)*

implemented via 24(8) If the Appeals Commission is of the opinion that a disease or condition may be linked to employment in a particular industry or process or linked to an activity carried out in a particular type of employment, the Appeals Commission shall so notify the Board and the Committee. (ODIAC)

- *Rec. 31 amend the definition of first responder for the purposes of presumptive coverage for PTSD to include additional occupations (p.88) implemented via 24.2 (3) If a worker (a) is or has been exposed to a traumatic event or events during the course of a worker's employment, and (b) is or has been diagnosed with a psychological injury by a physician or psychologist, the psychological injury shall be presumed, unless the contrary is proven, to be an injury that arose out of and occurred during the course of the worker's employment. Together these changes weaken the tests to link potential claims to occupational causes, institutionalize the Appeals Commission to identify trends in appeals to the ODIAC, which in turn can recommend that such claims become automatically classified as occupational-related. Amending the WC Act to move away from evidence based decision making and introduce what approaches expanded presumptive coverage based on numbers of claims of a type in a certain industry is not supported. Adjudication and the appeal process must continue to be evidence based and decisions based on medical fact not history that may or may not be relevant. ACA recommends reversing these changes.*

5.6 Physician Choice

1. Please share your views and any suggestions on physician choice. Please indicate reasons for your response.

Bill 30 introduced a provision that the examination will be conducted by a physician of the worker's choice from a roster established by the Medical Panels Office. This has the potential of prolonging recovery time based purely on the availability of the physician the worker selects. The WCB should arrange for the worker to be seen by the next available health care provider, especially for specialists within Alberta's healthcare system. The current practice has resulted in situations where a worker on a seasonal layoff, as an example, can select the physician with the longest delay in appointment times to extend WC benefits. Furthermore, in situations where both Section 38 of the WC Act and Sections 46 and 50 of the OHS Act are relevant, there is confusion regarding who is responsible for the cost of the examination ordered by the Director of Medical Services.

5.7 Liability of Directors of Corporations

1. Please share your suggestions on corporate director liability. Please indicate reasons for your response.

   In the construction sector, the owner operator often provides direction at the worksite. The Alberta Act conceivably allows the situation where the owner operator could still be subject to litigation even though the corporation has WCB coverage. ACA recommends amending the Act to eliminate the potential for litigation for owner operators where they choose to forego personal coverage, as long as their corporation has coverage.

5.8 Lost Time Claims (LTCs)

1. Please share your views and suggestions on LTCs. Please indicate reasons for your response.

Introduction of a "grace period", whereby wages would continue to be paid by experience rated employers for the first two- or three-days post incident would have significant benefit to employers, workers and the WCB system overall. Claims would still be reported and costs other than wage replacement paid as per the usual process. However, we propose that a claim would not be counted as a time loss claim unless actual time missed extends beyond the grace period for LTC recording. In previous discussions, the WCB has indicated this would require a legislative change.

There are several reasons ACA favors making this change. Introducing a grace period would help alleviate the challenges created by physicians no longer completing forms at the time of a visit and providing workers with a copy. Employers would not accrue a LT claim because they were not able to offer suitable modified duties for no reason other than because they were not notified that a claim has been initiated or advised about relevant work restrictions on the date of accident.

Alcohol and drug cases provide another example where this would be helpful. Once an employee is tested post incident, they are generally required to sit out a waiting period pending the results. The WCB currently considers this a LT claim even though it is not a situation where the employee is unable to work because of a work-related injury. The WCB view is that because modified duties are not offered this becomes a time loss claim.

A grace period would also be beneficial for rural employers, where assessments often cannot happen quickly so restrictions to facilitate a return to modified work are not immediately known. If a grace period was introduced, factors that are not related to restrictions and limitations arising from a work-related injury would not be the determining factor in whether a claim is or is not a time loss claim.

This change would also be of benefit to workers in that there would be less emphasis on a return to work the day following an incident to avoid a LT claim and allows for identification of better modified work opportunities. This change would also help reduce concerns over potential claim suppression (there would be no "statistic" counted for short duration claims) and reduce WCB caseloads since these short term claims would be administrative only.

5.9 Employer Premiums Submission

1. Please share your feedback or suggestions on frequency of premium assessment and payment. Indicate reasons.

We see no reason to make any changes. Employers already have the option of making adjustments in cases where this is warranted, but requiring all employers to move to mandated monthly reporting creates an administrative burden on organizations where this is not needed.

5.10 Governance

WCB Board Membership and Selection

Currently, stakeholder confidence in the WCB governance is undermined because there is very limited accessibility to WCB Directors, and there is no obligation for them to communicate with stakeholders. 1. ACA recommends the Board recruitment process be lengthened so that employer associations are given sufficient time to recruit candidates for consideration. 2. ACA recommends that employer reps be

involved in the recruitment interviews as is currently the case with the Appeals Commission. 3. ACA recommends the current WCB Corporate Governance policy be revised to oblige that all seven of the WCB Directors meet regularly with broad stakeholder groups such as the Industry Task Force (for employers) and the Labour Coalition (for labour) as well as with employer associations.

Appeals Commissioner Term Limits

Future WCB Reviews

1. Please share your feedback or suggestions on the frequency of future WCB Reviews and review committees requirements. Indicate your reasons.

ACA recommends against a statutory review cycle with so great a frequency as to create uncertainty and confusion in what is already a complex system. Bill 30 mandated a review of OHS legislation every 3 years. This review is paid for by industry but controlled by government. Reviews should be driven by identified needs and those who pay for these reviews ought to be able to identify matters for review. We recommend that mandatory reviews be dropped or amended to 10 years, and if mandatory, there must be a mandatory process to allow employers to identify topics for mandatory review.

2. Please share any feedback or suggestions for changing governance provisions in any of the other preceding categories. Indicate reasons.

Other Considerations

1. Do you have any suggestions for streamlining the Act and associated regulations for reducing red tape, regulatory and/or administrative burdens, while still supporting injured workers?
2. Are there any other issues or suggestions related to Alberta's workers' compensation system, the Act and associated regulations and the administration of the Act and/or regulations that you would like to be considered?

a) ACA recommends repetitive strain injuries for older workers be treated as an occupational illness similar to hearing loss (that is, the costs be borne by the industry group as a whole rather than an individual employer).

b) ACA recommends that the WCB formalize the use of in-person multi-stakeholder consultation, where the anticipated change will incur costs above a threshold, for example, where costs impacting those most affected by the change are going to increase by more than 5%. Previous consultations where multiple stakeholders were involved created the opportunities to share perspectives and increase stakeholder understanding of the potential impacts of the change. Many ACA employers operate in more than one province, and are able to share approaches to the same policy issue that are employed elsewhere.

c) WCB decision makers are not quoting applicable legislation and policies. WCB decision makers are also not citing all evidence considered. In some cases, the employer has not even received a written decision. ACA recommends specific policies should be identified and cited for all decisions made on claims.

d) Contractors undertaking work in remote locations frequently must accommodate their workers in camps designated by the purchaser of the construction service (the owner). These camps are owned and operated by the owner or a third party which contracts with the owner. Claims arising from ingress or egress incidents in a camp (eg. Injury arising from slipping on ice) where the employee is beyond the supervision of the employer are invariably assigned to the contractor. The contractor can then seek cost relief but is frequently reluctant to do so for fear of losing repeat business with the owner, should the reassignment of the claim cost impact the owner. ACA recommends that the claim be automatically assigned to the camp operator when the operator is determined to be negligent, and otherwise be assigned to the industry group rather than the individual contractor.