

BUSINESS SEMINAR

Bill 41: Amendments to the *Workers Compensation Act*

Presented on May 9, 2023 by:

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INTRO

- Welcome, from the Employment, Labour & Disability Group at KSW Lawyers.
- Our growing group has 7 lawyers and 6 supporting staff to assist our clients, with dedicated WorkSafeBC team.
- Covering all facets of workplace issues including labour/union, WorkSafeBC/OHS, Contracts & Policies, Planning, Terminations, Taxation, etc.
- Today covering new Bill 41 Amendments to the WCA.

INTRO - Bill 41

- [Bill 41- 2022: Workers Compensation Amendment Act \(No. 2\)](#), 2022 (“Bill 41”)
- Received Royal Assent on November 24, 2022
- Since 2018, 5 lengthy and comprehensive [reports](#) reviewing various aspects of the compensation system
- Most of Bill 41 amendments originate from 2019 Patterson report expanding on “worker centered approach” (517 pages long, 102 recommendations)



Fair Practices Commissioner

356 (4) The fair practices commissioner may do the following:

- (a) investigate complaints by employers, workers and dependants of workers regarding alleged unfairness in their dealings with the Board;
- (b) make recommendations to the Board to (i) resolve complaints referred to in paragraph (a), or (ii) address systemic problems with the fairness of the Board's dealings as indicated by such complaints;
- (c) make recommendations to the Board about systemic problems with the fairness of (i) the application of policies of the board of directors, or (ii) practices and procedures of the Board; BILL 41 – 2022 9
- (d) undertake any other activity prescribed by regulation of the Lieutenant Governor in Council.



The screenshot shows a web form titled "Complaint to the WorkSafeBC Fair Practices Office". It includes a "RESET" button in the top right corner. The form contains several sections for user information, including "Last name", "First name", "If you are a worker, include your WorkSafeBC account number", "If you are an employer, include your WorkSafeBC account number", "Home address", "Current phone number", "Alternative phone number", "City", "Province", "Postal code", and "When is the best time to contact you between 9:00 a.m. and 5:00 p.m.?" with a dropdown menu. There are two large text areas for "All complaint is about the following:" and "List any actions that you have taken to resolve the issue:". At the bottom, there are checkboxes for "Do you have an active order or appeal currently concerning this issue?" and "If you wish to be kept on the list of the decision under active review or appeal?", followed by "Yes" and "No" options. There are also fields for "Signature" and "Date submitted". At the very bottom, there are "ATTACH" and "SUBMIT" buttons. A small disclaimer at the bottom states: "WorkSafeBC collects information on this form for the purpose of addressing and improving the Worker Compensation Act. Please note, along with the provision of information and provision of services, WorkSafeBC is committed to the privacy of your information. To learn more about the collection of personal information, contact WorkSafeBC's Privacy Office at 604-273-3333 or 1-800-663-6828, or visit www.worksafebc.com/privacy." The footer shows "1/18/20" and "WorkSafeBC Page 1 of 1".

Non-Traumatic Hearing Loss

TABLE

Item	Column 1 Range of Hearing Loss (decibels)	Column 2 Percentage of Disability for Ear Most Affected	Column 3 Percentage of Disability for Ear Least Affected
1	0-27	0	0
2	28-32	0.3	1.2
3	33-37	0.5	2.0
4	38-42	0.7	2.8
5	43-47	1.0	4.0
6	48-52	1.3	5.2
7	53-57	1.7	6.8
8	58-62	2.1	8.4
9	63-67	2.6	10.4
10	68 or more	3.0	12.0

Independent Medical Examinations

(1.1) Subject to subsection (8), the presiding member must retain a health professional to provide independent assistance or advice in an appeal if all of the following apply:

- (a) the appeal tribunal receives a request under subsection (1.2) from an employer, a worker or a dependant of a deceased worker;
- (b) the medical condition of the worker is at issue in the appeal;
- (c) the appeal tribunal determines that the independent assistance or advice would assist in reaching a decision on the appeal. (1.2) If an employer, a worker or a dependant of a deceased worker is a party to an appeal, the employer, worker or dependant may request that the appeal tribunal retain a health professional to provide independent assistance or advice in the appeal. (1.3) A request under subsection (1.2) must be made in writing or in another form authorized by the appeal tribunal's rules.

Payment of Interest

- 231.1 (2) Interest must be paid on any amount of compensation that
- (a) is determined to be payable following a review under Part 6 [Review of Board Decisions] or an appeal under section 288 [review decisions that may be appealed], and
 - (b) remains unpaid for a period of at least 180 days after the effective date.
- (3) Interest payable under subsection (2) must be calculated in accordance with the policies of the board of directors and begins on the effective date.
- (4) Despite this section, if interest is payable on an amount of compensation under section 312 [*payment of compensation following appeal*], interest is not payable under this section on that amount of compensation in respect of the same period.



Indexing Benefits to Full CPI

Cost of living allowance

What is a cost of living allowance?

Put simply, a cost of living allowance is a payment intended to help protect you from inflation by maintaining your purchasing power.

How cost of living allowance applies to your benefits

If you receive compensation payments from us, your payments may be affected by a cost of living allowance.

We apply the cost of living allowance every January 1, using a formula set out in provincial government legislation. The allowance can't be greater than 4% or less than 0%, and will never reduce your benefits.

When your benefits may be adjusted

If changes in the Consumer Price Index are very small, or even negative (meaning prices are lower than they were a year ago), your benefit levels won't change. A substantial change in the Consumer Price Index could increase your benefit levels, by a maximum of 4%.

We apply a cost of living allowance every January 1. The date of your injury determines when you will be eligible.

- If you have been receiving payments from us for an injury that occurred more than 12 months prior to January 1, you are entitled to a cost of living allowance as of January 1.
- If your injury occurred within the last 12 months prior to January 1, you are not entitled to a cost of living allowance until the next January 1.

Who is affected?

Your payments may be adjusted with a cost of living allowance if you receive any of the following from us:

- Some long-term wage-loss benefits
- Some vocational rehabilitation benefits
- Permanent disability awards
- Other periodic allowances and benefits

“Restore indexing of workers’ compensation benefits to the full rate of annual percentage changes in the Canadian Consumer Price Index (CPI). WorkSafeBC will have the discretion to approve annual indexation above 4%, if the percentage change in the CPI exceeds that amount.

Since 2002, cost-of-living increases for benefits have been indexed to the rate of annual changes in the CPI, minus one percentage point, to a maximum of 4%. Limiting cost-of-living increases is unfair to workers and erodes the value and purchasing power of benefits over time.”

See: <https://news.gov.bc.ca/releases/2022LBR0015-001623>

Employer Must Not Attempt to Prevent Reporting

Section 73 amendments:

(2) An employer or supervisor must not, by agreement, threat, promise, inducement, persuasion or any other means, seek to discourage, impede or dissuade a worker of the employer, or a dependant of the worker, from

(a) making or maintaining an application for compensation under the compensation provisions, or

(b) receiving compensation under the compensation provisions.



Commencement Dates

Provisions of Act	Commencement
Anything not elsewhere covered by this table (s 2 – Employer Claim Suppression) (s 3 – Percentages of disability) (s 5, 12 – <u>Non Traumatic</u> Hearing Loss) (s 10 - % change in the consumer price index)	The date of Royal Assent (Nov 24, 2022)
Section 4 – Duty to Cooperate and Duty to Maintain Employment	TBD - By regulation of the Lieutenant Governor in Council
Section 6 – Payment of interest	April 3, 2023
Section 7 – Administrative Penalties	TBD - By regulation of the Lieutenant Governor in Council
Sections 8 and 9 – Health professional assistance	April 3, 2023
Section 11 – Fair Practices Commissioner	May 1, 2023
Section 13 – Transitional Provisions	TBD - By regulation of the Lieutenant Governor in Council
Sections 14 and 15 – Transition – interest; Transition – independent assistance or advice	April 3, 2023

Duty to Cooperate

Under s 154.2 the reciprocal duty to cooperate between the employer and the worker include:

- contacting each other as soon as practicable after the injury and maintaining communication;
 - identifying suitable work for the worker that, if possible, restores the full wages the worker was earning pre-injury;
 - informing the Board of the worker's return to or continuation of work; and
 - responding to any requests of the Board.
- Duty does not apply if contact and communication are likely to imperil or delay the worker's recovery.
 - Either party can each lodge complaints to the Board for failure to cooperate, and the Board must make a decision on the matter within 60 days.



Duty to Cooperate cont'd

- Two-way communication requirement for workplace injury claims
- Employers often avoid direct contact with the injured worker and only communicate with the Board
- Injured worker may only deal with treatment providers and case manager
- Both employer and worker must begin a dialogue about returning to work as soon as practicable



Duty to Cooperate Cont'd

- WCA does not define "as soon as practicable"
- S. 149(2) of WCA requires worker to inform employer of workplace injury as soon as practicable
- WCAT panel considered the phrase and defined "practicable" as feasible in all circumstances
- Case by case determination required based on subjective and objective criteria to determine if requirement is met



Duty to Cooperate - “as soon as practicable”

- BC Court of Appeal interpreted "as soon as practicable" to mean "with all reasonable dispatch having regard to all the circumstances"
- Communication may not be practicable immediately in cases where worker is seriously injured and requires time to recover
- Single exception to communication requirement is if contact would imperil or delay the worker's recovery
- Mental health claims resulting from workplace violence, bullying, or harassment may require expert opinion to determine communication necessity

Duty to Cooperate – Suitable Work

- Second aspect of Duty to Cooperate
- Goal: Identify suitable work to restore worker to pre-injury earnings
- Primary obligation of employer, but worker must assist on request
- Duty to Cooperate consistent with human rights principles
- Accommodation process requires participation of all parties
- Supreme Court of Canada: Complainant, employer, and union have duty to facilitate search for reasonable accommodation

Duty to Cooperate – cont'd

- Complainant must do their part in facilitating accommodation
- Cannot expect perfect solution
- If reasonable proposal is turned down, employer's duty is discharged
- Employer and worker must communicate and identify suitable work
- Information provided to Board for better administration of claim and worker's entitlements
- Duty to Cooperate does not obligate employer to offer suitable work (Duty to Maintain Employment addressed in next section)

Duty to Maintain Employment – s 154.3

Aka Duty to Accommodate

Duty applies to:

- employers with 20 or more workers, and
- in respect of workers who have been employed by the employer for at least 12 continuous months, and
- who have been unable to work as a result of a work-related accident.



Employer Must Offer Suitable Work

- Duty to maintain employment arises when injured worker becomes fit to work
- Two scenarios where duty is engaged - First scenario: worker is fit to work but not fit for pre-injury work
- Employer must offer first suitable work that becomes available; Suitable work is not defined in the WCA
- Meaning of suitable occupation discussed by Board in assessing loss of earnings
- Four criteria for suitable occupation
- Pre-existing non-compensable factors considered, post-injury factors not generally considered
- Example: office or sales job not suitable work for warehouse worker Bob with lifting restriction

Employer Must Offer Suitable Work

- Second scenario: worker is fit for pre-injury work
- Employer must offer either pre-injury work or comparable alternative work
- Comparable wages and position similarity may lead to disputes
- Duty to Maintain Employment introduces job-protected workers' compensation leave
- Employer must place employee in same or comparable position when leave ends

Undue Hardship

- Employers must make changes to work or workplace to accommodate injured workers to the point of undue hardship
- Undue hardship is not defined in the WCA
- WorkSafeBC decision-makers and WCAT vice chairs may look to the Code and human rights jurisprudence for guidance
- The Supreme Court of Canada has listed factors such as financial cost, collective agreement disruption, and employee morale as relevant to undue hardship
- Some hardship is acceptable, only "undue" hardship satisfies the test

Undue Hardship cont'd

- Human rights law may be applied to interpret undue hardship in the WCA
- Employers only need to show that it is unduly hard, not impossible, to integrate a partially disabled worker back into the workplace
- Employers do not have to change working conditions in a fundamental way but may need to offer variable work schedules or lighter duties
- Employers generally do not have to create new positions or displace workers to accommodate an injured worker
- Such measures would rise to the level of undue hardship

End of Duty to Maintain Employment

- Duty ends after 2 years of absence
- Employer no longer obligated to offer accommodated work after two years
- Common law concept of "frustration of employment" applies after lengthy absence
- Duties also end if employee returns to suitable work by two-year anniversary
- Employer may stop offering alternative work at this point
- Date of injury is important for determining end of duties, may be challenging in certain cases (e.g. occupational disease, mental health injuries)

Penalties for Failure to Comply

- If employer found to have breached the duty to cooperate or duty to re-employ, the Board may:
 - compensate worker by paying them amount equivalent to compensation that worker was entitled to pursuant to temporary total or partial disability provisions of the WCA;
 - the Board can also impose administrative penalty on employer in amount not exceeding Board's maximum wage rate for applicable year - 2023 maximum wage rate is \$112,800!
- Employers may appeal administrative penalties to the Review Division (within 90 days of decision date) and further to the Appeal Tribunal (WCAT).



Takeaways

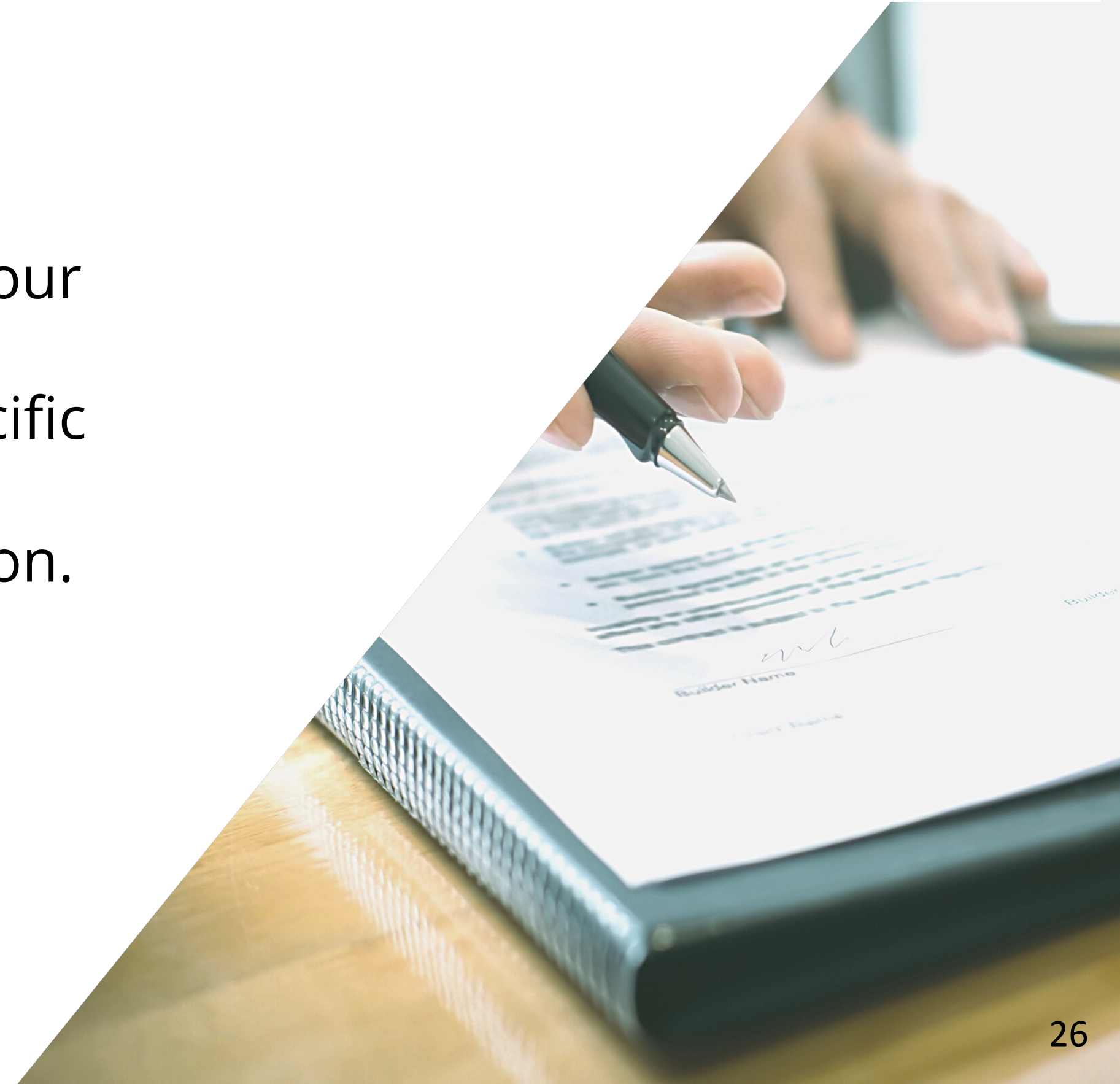
- Know and understand the WCA to be able to evaluate where there is a basis to challenge an injury claim and avoid the imposition of these duties that get triggered.
- Keep an eye out on Regulations to know when some of the amendments come into force.
- Communication is key – ensure early communication with worker and Board in event of a claim.
- Have good record keeping for: date of employment, injury date, termination date, length of time off work.
- Review human rights law around undue hardship concept & keep an eye on decisions.

Takeaways

- Given additional duties and obligations towards injured workers, employers should evaluate whether they wish to protest new WorkSafeBC claims. Once claim accepted, everything triggered.
- Avoid terminating workers returning from WorkSafeBC claims within the first 6 months. If you must terminate returning injured workers, make sure you document reasons very well.
- Communication is key – ensure early communication with worker and Board in event of a claim.
- Keep an eye out on Regulations to know when some of the amendments come into force.
- Take these obligations seriously – penalties can have a big impact.
- Get to know and follow the WCA provisions.
- Have good record keeping for: date of employment, injury date, termination date, length of time off work.
- Review human rights law around undue hardship concept.

Note to Audience

The content in this presentation is for your general information and should not be taken as legal advice. If you have a specific problem, please contact one of the speakers to discuss your specific situation.





QUESTIONS? Tell us on the chat!



THANK YOU



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