

SEVERED TRUST:

Enabling WorkSafeBC to do the right thing when its mistakes hurt injured workers



OMBUDSPERSON
BRITISH COLUMBIA

Public Report No. 52

September 2021

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OMBUDSPERSON
BRITISH COLUMBIA

September 2021

The Honourable Raj Chouhan
Speaker of the Legislative Assembly
Parliament Buildings
Victoria BC V8V 1X4

Dear Mr. Speaker,

It is my pleasure to present the Ombudsperson's Public Report No. 52, *Severed Trust: Enabling WorkSafeBC to do the right thing when its mistakes hurt injured workers*.

The report is presented pursuant to section 25(1) of the *Ombudsperson Act*.

Yours sincerely,

Jay Chalke
Ombudsperson
Province of British Columbia

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FROM THE OMBUDSPERSON

What happens in the rare circumstance when a public body makes a mistake and, as a result, a member of the public is grievously injured?

Does the public body step up and make it right? Or, does the public body hide behind legal technicalities and a hundred-year-old “historic trade-off”?

The better answer is obvious. But it is not what happened to one injured worker.

This report is about a cabinet maker, Mr. Snider, who lost the tips of some of his fingers in a workplace accident. As is normal in the case of an injured worker, he received care and benefits through the workers’ compensation system administered by WorkSafeBC. However, after a few months, those benefits were terminated because WorkSafeBC insisted Mr. Snider could return to working with the same tools that caused his injury. Fearing reinjury if he returned to work, he objected to WorkSafeBC about the termination of his benefits, pointing out that the machines he worked with were dangerous, their blades were sharp, and his partial fingers made controlling the machines difficult. Despite medical evidence supporting Mr. Snider, WorkSafeBC didn’t change its position. Facing financial hardship, and with no other options, Mr. Snider returned to work.



Shortly after returning to work a second, more serious, accident occurred. As Mr. Snider had foreshadowed, his grip was poor because of his injured hand. He lost control of the item being cut and his hand slipped into the sawblade. Mr. Snider’s thumb and three of his fingers were fully or partially amputated by the sawblade. He underwent a total of 26 hours of surgery and spent 10 days in a hospital intensive care unit.

After the second accident WorkSafe’s own Review Division ruled that WorkSafeBC was wrong to have terminated Mr. Snider’s benefits following the first accident.

WorkSafeBC awarded Mr. Snider benefits for the second accident on the same basis as any other injured worker, but did not compensate him for its own role in this tragedy.

We asked WorkSafeBC to apologize and to implement changes in its practices in order to mitigate the risk of this happening to anybody else. WorkSafeBC did those things. But they have declined to pay Mr. Snider any money beyond the schedule of benefits, saying they are not legally able to do so.

Because the existing legislation prevents WorkSafeBC from acting, I am recommending the Minister of Labour bring forward legislation that would give WorkSafeBC the ability to voluntarily pay money to someone in the extraordinary event where WorkSafeBC determines that their own error has caused a grievous injury. And because that would take some time, I am recommending that government make an ex-gratia payment to Mr. Snider in recognition of the harms he has suffered.

Government has taken the position that allowing WorkSafeBC to voluntarily make a payment in circumstances such as these is inconsistent with the “no-fault” basis of workers compensation – the “historic trade-off” that allows the workers compensation system to function. I disagree. The no-fault principle ensures injured workers are compensated without having to show their employer caused the injury. It has nothing to do with preventing WorkSafeBC from fixing its own errors that cause further harm, if that it is the right thing to do.

Government has also taken the position that my recommendation is inconsistent with the statutory immunity provision in the *Workers Compensation Act*. I do not agree with this position. My recommendations can be implemented in a way that ensures WorkSafeBC will continue to be protected from legal liability through statutory immunity provisions which would remain unaltered. However, it will also be able to voluntarily compensate a person who has been grievously injured as a result of WorkSafeBC’s mistake.

And so, it comes down to this. A worker loses part of his hand in a horrific, painful and disabling accident that will impair his quality of life forever. And it happened because of a mistake by a public body. And the worker bears the loss – not the public body that erred, nor the government that established and preserved the legislative framework that prevents the public body from doing the right thing.

I am disappointed to date that all three of my recommendations have not been accepted and am issuing this report to bring public attention to what I consider a regrettable shortcoming in the worker’s compensation scheme in this province.

I look forward to ongoing dialogue with government regarding the findings and recommendations in this report and will continue to seek the changes I outline in hopes that no worker in this province has to endure a similar experience in the future.

Sincerely,



Jay Chalke
Ombudsperson
Province of British Columbia

INTRODUCTION

The British Columbia Workers' Compensation Board, which operates today as WorkSafeBC, has been protecting and assisting workers in this province since 1917. Today, WorkSafeBC acts to protect workers from injury and ensures that when accidents do occur,

eligible individuals receive medical treatment, vocational rehabilitation support and financial assistance. Empowered by the *Workers Compensation Act*, WorkSafeBC oversees an insurance system that has safeguarded workers for over 100 years.

WorkSafeBC's stated mandate is to:

- Promote the prevention of workplace injury, illness, and disease
- Rehabilitate those who are injured, and provide timely return to work
- Provide fair compensation to replace workers' loss of wages while recovering from injuries
- Ensure sound financial management for a viable workers' compensation system

The stated mission of WorkSafeBC is to:

- Champion safe and healthy workplaces
- Save lives and prevent injury and disability
- Deliver outstanding service to workers and employers
- Provide and support excellent medical and rehabilitative care to workers
- Preserve the financial integrity and sustainability of the compensation system
- Learn, lead, and share

In supporting and strengthening its core mandate and mission, WorkSafeBC espouses the core values of:

- Service
- Integrity
- Accountability
- Partnership
- Innovation

The relationship between workers and employers, facilitated by the *Workers Compensation Act*, is often referred to as the “historic compromise.” In this compromise, The *Workers Compensation Act* provides a “no fault” compensation and assistance system that protects employers from litigation while providing eligible injured workers with reliable wage-loss benefits, vocational rehabilitation and medical treatment. Workers have access to benefits regardless of the financial or business status of the employer after injury.

In return for not having to defend against litigation and pay settlements or judgments when one of their employees is injured on the job, employers are required to contribute to a fund that is drawn upon by WorkSafeBC to provide benefits to workers and their dependants. This fund also supports the regulation of occupational health and safety in the workplace and is used to compensate government for funding the Workers’ Advisers Office and the Employers’ Advisers Office.

In structuring the workers’ compensation system, the *Workers Compensation Act*, as it is currently written, provides immunity to WorkSafeBC for the consequences of its own

actions that harm already injured workers. As such, should an injured worker be further harmed as a consequence of the actions or inactions of WorkSafeBC, and should the review and appeals process be unable to prevent that additional harm before it occurs, WorkSafeBC has no obligation, or indeed no ability, to provide compensation or restitution outside of the provisions of the *Workers Compensation Act*. As a result, WorkSafeBC is protected by the Act from liability for negligence or other unjust conduct. How this aligns with WorkSafeBC’s stated core value of accountability is unclear.

The intention of this report is not to lay blame or fault on WorkSafeBC or any one of its thousands of employees who are dedicated to preventing injuries and assisting injured workers. Their work is difficult and too often thankless. The intention of this report is to shine a light on what can and does happen when an error made by WorkSafeBC causes serious, irreparable harm to an already injured worker who has no recourse but to further navigate the complex system that failed them following their original injury.

THE CASE OF MR. SNIDER

Note: To protect the worker's privacy, this report uses the pseudonym "Mr. Snider" for the worker.

Mr. Snider's experience with WorkSafeBC

Mr. Snider had nearly 25 years of experience working as a cabinet maker when he was injured on the job. While at work, Mr. Snider was operating a table saw when he suffered a partial amputation of the tips of his left index, middle, ring and little fingers. WorkSafeBC accepted Mr. Snider's injury claim and provided temporary wage-loss benefits while he underwent surgery, received rehabilitation services and participated in a gradual-return-to-work program. WorkSafeBC stopped paying wage-loss benefits after incorrectly concluding that Mr. Snider was able to safely return to his pre-injury job, full-time and without restrictions.

When Mr. Snider's wage-loss benefits ended, he had informed WorkSafeBC that he was not capable of returning to his pre-injury job in a full capacity. He maintained that, as a result of the partial amputation of four fingers he continued to have difficulties gripping objects and was concerned that he might reinjure himself if he attempted to return to operating industrial woodworking machinery. He appealed WorkSafeBC's decision to end wage-loss benefits.

Mr. Snider's poor grip was well documented both before and after his temporary wage-

loss benefits ended. Approximately two weeks before the benefit ended, Mr. Snider's employer let him go because of a lack of work resulting from a lack of contracts. Shortly thereafter, Mr. Snider's physician instructed him to remain off work for further testing to determine whether he had suffered permanent nerve damage to his hand. The results of these tests would help determine whether he would ever be able to return to work in his full pre-injury capacity. The final report from an occupational rehabilitation program stated that while Mr. Snider had returned to work before being let go, he had difficulty using tools and would need to be cleared by his surgeon before returning to work full-time and without limitations. Despite this report, and based on a gradual return-to-work progress report delivered to WorkSafeBC shortly after Mr. Snider was laid off, his WorkSafeBC case manager determined that Mr. Snider was capable of returning to work at full capacity. As a result, the case manager terminated Mr. Snider's wage-loss benefits. Now with no source of income and facing financial crisis, Mr. Snider chose to return to the only skilled trade he knew in order to avoid homelessness. While the surgeon suggested that Mr. Snider could try working again in the absence of financial support from WorkSafeBC, the surgeon also explained to WorkSafeBC that Mr. Snider was permanently impaired as a result of his injury.

To avert a financial crisis while his appeal application was before WorkSafeBC's Review Division, and after speaking with his surgeon, who suggested he could try working again while he appealed the decision, Mr. Snider accepted a job and returned to his pre-injury trade. Mr. Snider explained that he was concerned about his continued employment with the company during a downturn in the industry, particularly as he had recently been let go by his previous employer due to a lack of available work. As a result, Mr. Snider accepted all of the duties his employer requested that he perform. In doing so, Mr. Snider was acting consistently with WorkSafeBC's conclusion that he was capable of returning to work at full capacity. Shortly thereafter, Mr. Snider wrote to WorkSafeBC expressing concern for his well-being and explained that he did not feel safe operating the industrial machinery that he was required to use as a cabinetmaker. He informed WorkSafeBC that in less than a week he had lost control of two high-speed industrial saws and a dolly. He explained that his inability to adequately control two of the four partially amputated fingers on his injured hand, which reduced his ability to grip and hold objects, had caused these

incidents. He told WorkSafeBC that the tools he worked with were powerful and sharp, and that he did not believe he had safe control of them.

After expressing these concerns and receiving no response from WorkSafeBC, and while his appeal was still being considered by the Review Division, Mr. Snider was once again operating a table saw at work when he suffered a second, catastrophic injury. While cutting an item on the table saw, Mr. Snider's poor grip with his left hand caused him to lose control of the item being cut. Mr. Snider's left hand then slipped forward into the industrial sawblade. First to contact the blade were two of his already partially amputated fingers, the joints of which had either been fused in the extended position or had lost considerable range of motion as a result of his first accident. As these fingers were being severed, the blade pulled the remainder of Mr. Snider's hand into its path, causing catastrophic tissue and bone damage, with significant loss of blood. The blade amputated Mr. Snider's thumb below the last joint, fully amputated his index finger just above the knuckle, and amputated his middle and ring fingers close to the end joints. Mr. Snider then underwent 26 hours of surgery and spent 10 days in hospital in an intensive care unit.

LETTER FROM MR. SNIDER TO WORKSAFEBC AFTER HIS RETURN TO WORK AND BEFORE HIS SECOND WORKPLACE ACCIDENT

"...My concern is that in less than a week I lost control of a router, a jigsaw and a dolly that I was moving down a ramp. This is because of my left hand. I have 2 fingers that I have no control over, not only that but they stick strait out, very dangerous. And the 2 fingers that I can move are weak and only close $\frac{3}{4}$ of the way..."

"I don't want to hurt myself again. I'm hoping instead of doing that we can figure something out soon. I'll see anyone you want, any time you want me to..."

"The tools that I work with are quite powerful and sharp and I need to control them better than I can or I'm going to hurt myself again, or someone else very soon..."

WorkSafeBC's Review Division finished its assessment of Mr. Snider's request for review of WorkSafeBC's decision to terminate his wage-loss benefits related to the first injury only after his second injury occurred. The Review Division found that Mr. Snider had, in fact, not been capable of returning to work without limitations when WorkSafeBC suspended his benefits after concluding that he could return to work at full capacity without limitations. The Review Division noted that although Mr. Snider sustained his first injury while using hand-operated power tools, "there was no assessment of that aspect of his job duties or his ability to continue to properly use hand power tools despite the fact that the [occupational rehabilitation program] discharge report indicated he may have difficulty using tools."

Subsequent appellate decisions reiterated that WorkSafeBC had erred when concluding that Mr. Snider was capable of safely returning to his pre-injury employment without limitations at the time his benefits were terminated.

The appellate decisions eventually found that this second partial hand amputation was directly caused by his initial injury. WorkSafeBC did not, however, acknowledge the role its error played in causing the second injury. Rather, WorkSafeBC maintained, and continues to maintain, that because the Review Division and the Workers' Compensation Appeals Tribunal (WCAT) reached the conclusions they had, WorkSafeBC's incorrect decision to terminate Mr. Snider's wage-loss benefits had been administratively cured and the appeals system had worked as it should have. The fact that Mr. Snider had only returned to work and sustained the second injury as a result of the financial pressure caused by the initial WorkSafeBC decision was not recognized. No recognition of WorkSafeBC's incorrect decision, or even an apology, was initially offered to Mr. Snider. To the contrary, WorkSafeBC and its Review Division made further errors in the administration of his claim,

forcing Mr. Snider into an extended cycle of appeals through WorkSafeBC's and WCAT's complex appeals processes.

The legal and procedural framework

Wage-loss benefits are paid to workers under Section 4, Division 6 of the *Workers Compensation Act* for temporary partial disabilities. Sections 191 and 192 of the Act and policy item #35.30, *Duration of Temporary Disability Benefits*, of the *Rehabilitation Services and Claims Manual, Vol. II*, require that temporary disability benefit payments cease when a worker either fully recovers from the injury, or when the injury or condition stabilizes and becomes permanent.

Policy item #35.10, *Meaning of Temporary Partial*, provides that to be eligible for benefits under section 192(1) of the Act, the worker must have a temporary partial physical impairment as a result of the compensable injury. It states:

Workers will also be considered to have a temporary partial disability when, even though they would ordinarily be considered as temporarily totally disabled, they do in fact continue to carry out their previous jobs in part or perform some other type of light work.

Additionally, policy item #34.54, *When Is the Worker's Condition Stabilized*, states:

When a worker is medically examined to assess the degree of impairment, the examining doctor must first determine whether the worker's condition has stabilized...Having regard to the examining doctor's report and any other relevant medical evidence, WorkSafeBC will then decide whether or not the worker's condition is permanent...

When a condition remains temporary, the worker will be maintained under wage-loss benefits. When a condition is determined to be

permanent, workers are assessed for eligibility to receive a permanent disability award, based in part on the difference between their pre-injury income and post-injury income potential.

WorkSafeBC concluded after Mr. Snider's initial injury that he was capable of returning to his pre-injury job full-time and at full capacity. As such, WorkSafeBC determined that Mr. Snider was no longer eligible for temporary wage-loss benefits because he was capable of working at full capacity while earning the same income he had earned before the injury.

Immunity from legal action

Section 332 of the *Workers Compensation Act* states that legal action cannot be brought or maintained against WorkSafeBC or its representatives in respect of any act, omission or decision that was within WorkSafeBC's jurisdiction to make. This broad immunity clause has been upheld by recent court decisions that confirm that workers harmed by the actions of WorkSafeBC have no reasonable prospect of success when bringing a claim against the organization. In the recent case of *Muldoe v. Derzak*, 2021 BCCA 199, the British Columbia Court of Appeal considered a claim against the actions of a WorkSafeBC employee who the appellant argued had caused him to return to work when it was unsafe for him to do so and to suffer a second injury as a result. The Court of Appeal found that the immunity clause of section 332 of the *Workers Compensation Act* prevents workers from bringing claims against WorkSafeBC and its staff relating to matters that fall within the mandate of WorkSafeBC.

In short, the *Workers Compensation Act*, as it is currently drafted and interpreted by both WorkSafeBC and the courts, does not permit WorkSafeBC to be financially accountable for its errors, regardless of the seriousness of the harms such errors may cause.

This report concludes with a number of recommendations, one of which is to amend

the *Workers Compensation Act* to allow WorkSafeBC to be financially accountable for the errors it makes that cause grievous and irreparable harm to already injured workers. This recommendation does not challenge the immunity clause of section 332 of the *Workers Compensation Act*. Rather, the proposed amendment would allow WorkSafeBC to, on its own initiative, at its sole discretion and through its own recognition, take meaningful, accountable actions for those it fails most seriously.



Evidence of physical limitations prior to the injury

Following Mr. Snider's initial injury and immediate treatment, WorkSafeBC referred him to a hand therapy program. The discharge report from that program noted, in part, that the finger joints that had to be fused together would not flex and therefore impacted his ability to grip objects and could potentially "get in the way" during basic hand functions.

After completing the hand therapy program, Mr. Snider was referred to an occupational rehabilitation program. The discharge report from that program concluded that he was capable of returning to his pre-injury employment with limitations and that it was expected that he might be capable of returning to his regular hours and duties over a six-week period. The report noted that he should be closely monitored over that time.

Subsequent monitoring reports to WorkSafeBC stated that Mr. Snider continued to experience pain and fatigue in his injured hand after completing shifts, particularly when he was required to perform extensive gripping and pinching tasks. While the final report from his gradual-return-to-work program stated that he had returned to his pre-injury duties, it also stated that he would only be able to return to work full-time and at full capacity “when he [was] medically cleared” by his surgeon.

WorkSafeBC misinterpreted this report to mean that Mr. Snider had returned to his pre-injury duties at full capacity. He had not. When WorkSafeBC spoke to Mr. Snider after reviewing the report, Mr. Snider attempted to correct WorkSafeBC’s misunderstanding. He specifically stated that he had not returned to work at full capacity because the work available at his place of employment during the gradual-return-to-work program did not include the type of work he had been conducting at the time of his first injury. This was because of the nature of the contract the employer was fulfilling at the time of the gradual return to work program.

Prior to Mr. Snider’s attempted return to work at full capacity, his surgeon reported to WorkSafeBC that he believed it was appropriate for Mr. Snider to work with his hands for a short period of time, after which he could be reassessed for additional medical treatment. Once again, WorkSafeBC misinterpreted this to mean that Mr. Snider was capable of returning to his pre-injury employment without limitations. WorkSafeBC subsequently spoke with the surgeon and noted in a phone memo that the surgeon had not told Mr. Snider that he was unable to work. Mr. Snider’s surgeon did not state that Mr. Snider had no physical limitations. To the contrary, the same memo notes that Mr. Snider was left with a permanent impairment.

After Mr. Snider attempted to return to work at full capacity, he underwent an assessment as part of the process for determining whether he

was eligible for long-term disability benefits. The resulting permanent functional impairment physical examination concluded that Mr. Snider had difficulties using his hand and suffered numbness, decreased sensory ability and difficulty gripping. The examination found significantly decreased range of motion in his fingers and impairment in four digits. Less than two months after this examination, Mr. Snider suffered his second injury.

Appellate decisions

Four months after Mr. Snider’s second injury, the Review Division concluded that the temporary disability benefits related to his first injury should not have been suspended. The decision stated that

although the worker sustained his injury under the present claim using power tools, there was no assessment of that aspect of his job duties or his ability to continue to properly use hand power tools despite the fact that the OR1 [occupational rehabilitation program] discharge report indicated he may have difficulty using tools. I also note that there was no assessment of the worker’s ability to perform duties involving fine motor dexterity...In this case, I am satisfied that the evidence supports that the worker continued to be temporarily disabled following the completion of the [gradual-return-to-work plan]...I am satisfied that the worker’s injury had not fully recovered nor had it yet stabilized as a permanent disability. The worker and [Mr. Snider’s surgeon] were indicating that he needed to continue to progress through more of his work duties and [the surgeon] was contemplating more surgery. The worker was being sent for further testing given his reported symptoms. In my view it was premature to determine that the condition had stabilized and that there was little potential for change in the next 12 months.

INJURY, APPEALS AND RETURN TO WORK TIMELINE

Injury dates

Medical reports

WorkSafeBC/WCAT
decisions

Mr. Snider's expressions of
concern to WorkSafeBC

Jan 4, 2010

While cutting a board on a table saw at work, Mr. Snider partially amputated three fingers and fractured a fourth on his left hand, leaving him permanently disfigured with limited hand function.

**Hand Therapy Discharge Report
May 6, 2010**

"The main issue here will be whether (Mr. Snider's) ring finger which is fused...will 'get in the way' due the fusion position. The distal tip does not flex and this can affect his ability to grip objects."

**Occupational Rehab Intake
Assessment Report
May 10, 2010**

"Flexion of digits 2, 3, 4 and 5 is limited, as is extension...He is not able to make a fist as his composite gripping is limited through the 4th and 5th digits...Grip strength is significantly limited...Barriers to return to work: Mr. (Snider) is currently not able to fully grip with his left hand and, as a result, his left sided gripping force is too limited."

**Plastic Surgeon Report
May 12, 2010**

Surgeon concludes that Mr. Snider is unable to return to work for at least another month due to poor grip and flexing.

**Occupational Rehab Progress
Report
June 10, 2010**

"...(Snider) has made improvements in his overall functional strength...He is not able to achieve 65 lbs on Jamar gripping testing protocol. His left 4th digit shows minimal improvements in terms of flexibility... Outstanding Barriers: Mr. (Snider) continues to display diminished grip strength and poor flexibility...which may affect his ability to resume all of his pre-injury job duties safely."

**Occupational Rehab Discharge
Report
July 20, 2010**

Despite not evaluating Mr. Snider's ability to safely operate the industrial machinery used in his profession, including the table saw involved in the first injury, the report concludes that Mr. Snider could return to work at full duties, part time, with limitations. The report continues to note reduced grip strength in Mr. Snider's left hand.

**Permanent Functional Impairment
Assessment Report
Nov 30, 2010**

Report to WorkSafe BC confirms Mr. Snider's left hand grip strength is well below the normal range.

**Expression of Safety Concerns
Sept 19, 2010**

Mr. Snider writes to WorkSafeBC expressing safety concerns with his return to work.

**Return to Work
Sept 13, 2010**

Mr. Snider returns to work in the absence of temporary wage-loss benefits. Mr Snider appeals the decision to stop paying those benefits to WorkSafeBC's Review Division.

**Claim Manager Telephone
Conversation with Surgeon
Sept 9, 2010**

Mr. Snider's surgeon confirms with WorkSafeBC that Mr. Snider will need a surgical reassessment after he continues to slowly increase the use of his hand at work. The surgeon reinforces that Mr. Snider "is left with a permanent injury and should be referred to a (Permanent Functional Impairment assessment)." WorkSafeBC does not ask about Mr. Snider's physical limitations..

**Report from Plastic Surgeon to WCB
Aug 26, 2010**

Mr. Snider's "...hand has plateau'd as far as his recovery now. The patient is at work, slowly increasing his activities at work. At this point in time, I think it is appropriate for the patient to work with his hand for about 3 months and then can be reassessed with regards to whether anything can be improved with further surgery." There is no mention of physical limitations in the report and WorkSafeBC does not inquire about them.

**Suspension of Benefits
Aug 23, 2010**

Mr. Snider's claim manager stops the payment of temporary wage-loss benefits after incorrectly concluding that Mr. Snider could return to his former position full-time, without limitations.

Jan 26, 2011

While once again operating a table saw, Mr. Snider's poor ability to grip with his left hand caused him to lose control of the item he was cutting. His left hand slipped into the blade, causing partial amputations of the previously intact thumb and index fingers, and further amputations of his already partially amputated middle and ring fingers.

**Review Division Decision
May 11, 2011**

Review Division determines that Mr. Snider's claim manager erred when concluding that he was capable of returning to work without limitations and suspending his temporary wage loss benefits.

**WCAT Decision #1
Nov 30, 2012**

WCAT corrects multiple WorkSafeBC and Review Division errors, increasing the percentage of his permanent disability award.

**WCAT Decision #2
Oct 17, 2013**

WCAT corrects erroneous conclusions by WorkSafeBC and the Review Division that Mr. Snider's second injury was not a consequence of his first injury. Because of those errors, WorkSafeBC had undercalculated the benefits he was entitled to.

**WCAT Decision #3
June 19, 2015**

WCAT corrects WorkSafeBC's errors of denying Mr. Snider multiple loss of earnings assessments as of the dates his condition plateaued both before and after his second injury. Subsequent assessments increase Mr. Snider's benefits.

The decision concluded:

While the [case manager] documented that she would discuss with a WorkSafeBC Medical Advisor whether the worker was at plateau and should be referred to [Disability Awards] for assessment given [the surgeon's] report, this did not occur. The worker's claim was referred to [Disability Awards] on the basis that he had plateaued. The worker remained partially disabled as he was unable to return to his full pre-injury duties and was still 'slowly' progressing in his recovery. The worker then sustained a second traumatic injury ...while doing the duties he indicated he was having difficulty performing.

The Review Division concluded that Mr. Snider was not capable of returning to work at full capacity when his wage-loss benefits were terminated. It then returned the matter of when his condition plateaued to his case manager to decide. The case manager subsequently, and again incorrectly, determined that Mr. Snider's condition had stabilized and become permanent as of the date he returned to his employer prior to his second injury. The case manager also erroneously concluded that the second injury was not a compensable consequence of the first. Because of this, the case manager calculated Mr. Snider's award based on the wages he was making at the time of the second injury, which were lower than his earnings at the time of his first injury. Mr. Snider appealed this decision. He explained that WorkSafeBC determined

that the date his condition stabilized was simply when he was "forced back to work". He further explained that his options at the time were either to return to work or enter financial crisis and become homeless. He also argued, correctly, that the second injury was a compensable consequence of the first, and that his wage rate should be based on his earnings at the time of the first injury.

It took nearly three years of appeals through the Review Division and WCAT to determine that Mr. Snider's second injury was causally related to his first injury. Despite this, it would take another two and a half years of appeals before WorkSafeBC correctly determined Mr. Snider's benefit entitlements. After a total of five years of navigating complex appeal processes to correct the series of errors made by WorkSafeBC and its Review Division (made after its most grievous error of concluding that he could return to work when he was incapable of safely doing so), Mr. Snider began receiving the benefits he was due.

As part of his successful appeals to WCAT, Mr. Snider sought compensation for WorkSafeBC's actions that had placed him in the position of having to return to work when it was not safe for him to do so and then to require him to engage in a seemingly endless process of appeals for nearly five years in order to receive the benefits he was entitled to. WCAT concluded that it did not have the jurisdiction to consider whether Mr. Snider should receive such compensation.



The sequence of events described above illustrates how recipients of compensation benefits are sometimes in a particularly vulnerable position, not only because the provisions of the *Workers Compensation Act* prevent workers from pursuing legal action against WorkSafeBC, but also because the denial of benefits can make it difficult for injured workers to meet their basic needs. WorkSafeBC has a duty to make decisions carefully and must take into account all relevant information in a manner that adheres to relevant law and policy.

Prior to our investigation, WorkSafeBC did not take responsibility for its role in causing Mr. Snider's second injury. It refused to apologize or compensate Mr. Snider for the decision that caused him to return to work when it was not safe for him to do so. It similarly refused to apologize for the multiple incorrect decisions made on his claim file after his second injury. While our investigation was ongoing, WorkSafeBC agreed to provide an apology to Mr. Snider, as well as to implement changes to its practices in an effort to prevent injured workers from experiencing trauma

similar to that suffered by Mr. Snider. Despite our proposals for WorkSafeBC to provide Mr. Snider with compensation or some other meaningful recognition for the harms it caused him, WorkSafeBC cited section 332 of the *Workers Compensation Act* when declining those proposals.

While we recognize that an apology is a good first step in taking responsibility for WorkSafeBC's errors, we believe that Mr. Snider's experience makes more action necessary to address the significant harms he suffered. While no financial sum can reasonably compensate Mr. Snider for the physical, financial and psychological hardships he endured throughout his experience with WorkSafeBC, an apology without financial compensation is simply insufficient. Were WorkSafeBC to provide Mr. Snider with meaningful compensation for its errors, not only would it provide a measure of relief for Mr. Snider, but it would also demonstrate that it is committed to being accountable for its actions in a manner that aligns with its core values.

Between the date of his second injury (January 26, 2011) and the date he began receiving all the benefits he was entitled to (March 29, 2016), Mr. Snider spent **five** years navigating complex serpentine appeals processes. Following **six** appeals through Review Division, **three** appeals through the Workers Compensation Appeals Tribunal, and numerous WCB implementation decisions, WorkSafeBC incrementally, and only nominally, increased the most basic awards Mr. Snider was entitled to under the *Workers Compensation Act*. As of March 29, 2016, Mr. Snider's benefits totaled **\$1,496.60** per month. The impact on Mr. Snider's mental health of his experience has never been assessed.

CONCLUSIONS

Following our investigations and consultations with WorkSafeBC, it was clear to us that Mr. Snider's workplace injury claim was mishandled and that he suffered egregious harms as a result. Unreasonable decisions made on Mr. Snider's claim resulted in grievous physical harm and forced him to further navigate a complex system of appeals that had already failed to protect him. In addition to the physical damage and pain he suffered, the psychological toll of his experience with WorkSafeBC was immense. As illustrated by Mr. Snider's experience, some errors made by WorkSafeBC can never be fully cured by any level of appeal.

In situations where an injured worker expresses safety concerns about returning to work, where medical evidence and opinions indicate that the individual should not return to work or not return at full capacity, or

where there is ambiguity in the evidence as to whether the worker is capable of safely returning to work, WorkSafeBC must proceed with an extra degree of caution. An even greater duty of care is required to ensure the safety of the worker when they are at significant risk of further serious injury.

Mr. Snider's situation is tragic for many reasons, one that there was little ambiguity in the evidence indicating that he had physical limitations that would place him at risk of harm should he return to his pre-injury occupation at full capacity. It is clear that WorkSafeBC made decisions that were either unsupported by evidence or in direct contradiction with that evidence. Medical information is critical to making an informed decision about recovery from an injury. If this information is missing, more investigation is necessary.



WorkSafeBC should err on the side of caution whenever there is a significant risk of harm to a worker. It did not do this for Mr. Snider, who continues to suffer the consequences.

WorkSafeBC serves a critical function in making B.C. a safe and prosperous province in which to work and do business. It has assisted many thousands of injured workers and has assisted in preventing countless injuries. As in the case of any industry or organization, positive change often comes by learning from past mistakes. We believe that WorkSafeBC is learning from the mistakes it made on Mr. Snider's claim, as it has taken a number of steps to prevent similar situations from occurring in the future.

Over the course of our investigation, WorkSafeBC explained that it had implemented a number of internal process improvements and verification steps in an attempt to ensure that the best decisions are made on serious injury claims. While we were encouraged by those steps, we believed additional measures could and should be taken to prevent such a serious error from happening again. With this motivation, and through lengthy consultations with our office, WorkSafeBC has agreed to take the following steps:

1. Develop and implement an "activities and limitations form" as initially proposed by Scott Petrie in his 2018 report to WorkSafeBC, *Restoring the Balance: A Worker-Centred Approach to Workers' Compensation Policy*. This form would require a treating physician to specify the physical limitations of an injured worker with respect to the activities they perform at work in situations similar to Mr. Snider's.
2. Develop and implement a mandatory manager review process for serious injuries (such as amputations) to ensure that a second level of review is conducted prior to determining that someone suffering from a serious injury is capable of safely returning to work.
3. Revise occupational rehabilitation service provider reporting templates to declare whether the specific mechanism of injury was reviewed when drafting reports and recommendations. In Mr. Snider's case, the occupational rehabilitation review did not consider the specific mechanism of injury when reaching its conclusions. Had it done so, the case manager might have had some added clarity about Mr. Snider's specific limitations and abilities.

We also proposed that WorkSafeBC take responsibility for its errors by formally apologizing to Mr. Snider and providing him with compensation or taking other meaningful action in recognition of the role it played in causing his second injury. In response, WorkSafeBC offered to apologize to Mr. Snider but declined to provide compensation, citing section 332 of the *Workers Compensation Act*.

We maintain that in situations like Mr. Snider's, meaningful recognition in the form of financial compensation is necessary in order to demonstrate WorkSafeBC's commitment to its core value of accountability, and to recognize that it had followed an unreasonable process that significantly and irreparably harmed a vulnerable, already injured, worker.

APPENDICES

Appendix A: Findings and Recommendations

Findings

1	WorkSafeBC acted unjustly when it determined that Mr. Snider was capable of returning to work at full capacity without limitations and suspended his temporary disability benefits related to his first injury.
2	The action referred to in Finding 1 directly led to Mr. Snider's second injury.

Recommendations

In addition to the steps WorkSafeBC has already committed to taking during our investigation to settle Mr. Snider's complaint, which include process improvements and a formal apology, I recommend the following:

1	By April 1, 2022, the Minister of Labour propose amendments to the <i>Workers Compensation Act</i> to create a mechanism and a fund that will enable WorkSafeBC to, on its own initiative and at its sole discretion, provide monetary compensation to individuals who WorkSafeBC concludes are grievously and irreparably harmed by its own mistakes.
2	By December 31, 2021, and while the proposed changes to the <i>Workers Compensation Act</i> are being developed, the Ministry of Labour provide Mr. Snider with an ex-gratia payment in recognition of the second accident resulting in the partial amputation of his hand, which occurred because of WorkSafeBC's mistakes in handling his initial claim. The amount of the ex-gratia payment is to be determined by a retired judge of the Supreme Court of British Columbia, applying the common law for the assessment of damages, taking into account amounts paid or payable by WorkSafeBC.
3	The Ministry of Labour pay the reasonable legal expenses incurred by Mr. Snider to make representations to the retired judge.

Appendix B: Response from WorkSafeBC, August 8 2021


OFFICE OF THE PRESIDENT AND CHIEF EXECUTIVE OFFICER

Mailing address: PO Box 5350 Stn Terminal, Vancouver BC V6B 5L5
Phone 604.247.5545 | [worksafebc.com](https://www.worksafebc.com)

August 8, 2021

VIA EMAIL: abockus-vanin@bcombudsperson.ca

Jay Chalke
Ombudsperson
PO Box 9039 Stn Prov Govt
Victoria, BC V8W 9A5

Dear Jay Chalke:

Re: Your File No. 15-143504

I am in receipt of your July 28, 2021 letter and final report regarding the workers compensation system and recommendations relating to awarding compensation to individuals in certain circumstances, such as that of Mr. Snider.

WorkSafeBC acknowledges the efforts of your Office in undertaking these investigations, preparing your report and proposing recommendations. WorkSafeBC also appreciates your Office's willingness to consult on the issues raised and to identify opportunities for improvements to both the adjudication of workers' compensation claims and the delivery of benefits and services to injured workers.

WorkSafeBC is committed to improving its service and support for injured workers and is taking action to move towards a more worker-centred service model, including policy and adjudication practice changes.

I would like to take this opportunity to reiterate the changes WorkSafeBC has made as a result of your investigation into the circumstances and WorkSafeBC's own review relating to the concerns raised by this injured worker.

- The Claims Services Division developed and implemented an Activities and Limitations Form to assist in gathering information from physicians and workers regarding a worker's restrictions and limitations prior to concluding temporary wage-loss benefits.
- The Claims Services Division developed and implemented a new process whereby all claims involving serious amputations or multiple digit hand amputation injuries must be reviewed by a client services manager. Training was provided to client services managers in May 2019.
- WorkSafeBC implemented changes to the OR program report template. The new template includes questions on the mechanism of injury and past medical history related to the injury site. These forms were released on March 11, 2019 and a bulletin was sent to the OR program network outlining the importance of job site visits and establishing critical job demands.
- The Vice President of Claims Services prepared a letter of apology to Mr. Snider, which included an offer to meet with Mr. Snider to discuss his concerns.

WorkSafeBC takes seriously the matters relating to Mr. Snider's circumstances and as you are aware, we have carefully reviewed and responded to his claim within our legal authority.

As all the recommendations made in your final report were directed to the Ministry of Labour and are beyond the scope of our enabling legislation, it would not be appropriate for WorkSafeBC to respond to the recommendations as you have requested.

Thank you for providing me the opportunity to respond.

Yours truly,

A handwritten signature in black ink, appearing to read 'Anne Naser', followed by a period.

Anne Naser
President and CEO

Appendix C: Response from the Ministry of Labour, August 11, 2021



Ref: 61953

August 11, 2021

Jay Chalke
Ombudsperson
Email: ABockus-Vanin@bcombudsperson.ca

Dear Jay Chalke:

Thank you for your letter of July 28, 2021, providing the Ministry of Labour (Ministry) the opportunity to review your revised and final report regarding a worker's experience with the workers' compensation system (Worker).¹ I appreciate that your revised report incorporates a number of the submissions the Ministry made in my letter of June 25, 2021 in relation to your earlier draft report.

As I indicated in my June 25, 2021 letter, the Ministry is extremely sorry to learn of the difficulties the Worker has encountered in accessing his workers' compensation benefits and the terrible consequences to him personally. The Ministry wishes to extend its sincere condolences to the Worker.

Your final report outlines that WorkSafeBC (Board) implemented several internal process improvements and verification steps in response to your investigation, and that, through consultation with your office, the Board then formally apologized to the Worker and implemented three additional measures to ensure that the Worker's experience would not be repeated:

1. Develop and implement an "Activities and Limitations Form" as initially proposed by Paul Petrie in his 2018 report to WorkSafeBC: 'Restoring the Balance: A Worker-Centred Approach to Workers' Compensation Policy.' This form requires a treating physician to specify the physical limitations of an injured worker with respect to the activities they perform at work in situations similar to the Worker's.
2. Develop and implement a mandatory manager review process involving serious injuries (such as amputations) to ensure that a second level of review is conducted prior to determining that someone suffering from a serious injury is capable of safely returning to work.

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¹ To respect this individual's privacy, the Ministry has chosen to refer to them in this manner.

Ministry of Labour

Office of the Deputy Minister

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3. Revise occupational rehabilitation service provider reporting templates to declare whether or not the specific mechanism of injury was reviewed when drafting reports and recommendations.

Your final report makes three recommendations to the Ministry. You have asked for the Ministry's response to each of your recommendations and I have set this out below.

Recommendation #1: That by April 1, 2022, the Minister of Labour propose amendments to the *Workers Compensation Act* to create a mechanism and a fund that will enable WorkSafeBC to, on its own initiative and at its sole discretion, provide monetary compensation to individuals who WorkSafeBC concludes are grievously and irreparably harmed by its own mistakes.

The Ministry appreciates the spirit and intent of this recommendation. However, the Ministry continues to have concerns with the recommendation for the reasons noted in our June 25, 2021 letter, namely, that the recommended legislative amendment is contrary to foundational workers' compensation principles, erodes the historic trade-off and is inconsistent with the intent of the immunity clause in the *Workers Compensation Act*. Your recommendation is aimed at achieving an amendment to the *Workers Compensation Act* to create fault-based liability for general damages. Such an amendment is contrary to the no-fault principles that underpin the entire system. In addition, even though your report contemplates the Board and not employers paying general damages, any money paid by the Board will come out of the Accident Fund established by the *Workers Compensation Act* which is funded by employers. Thus, employers would ultimately be required to pay for the proposed fault-based general damages scheme. This was never part of the historic trade-off upon which the entire workers' compensation scheme was founded.

Amending the *Workers Compensation Act* to add a mechanism for damages claims against the Board for its mistakes even where compensation is provided at the sole discretion of the Board would defeat the immunity clause which courts have recognized serves an important function in our society. As discussed in the Ministry's June 25, 2021 letter, the Supreme Court of Canada has recognized that statutory immunity clauses serve to preserve the independence and impartiality of decision-makers, keep decision-makers focused on their work and limit routes of collateral attack. The Ministry is concerned that your recommended amendment would have a chilling effect on the Board's decision-making, compromise its impartiality and open the door to collateral attacks on the Board's decision-making. The immunity clause is in place to protect against these things. Further, as the Ministry indicated in its letter of June 25, 2021, many British Columbia statutes contain various forms of immunity clauses that protect persons exercising statutory powers from being sued for anything done in the course of the exercise or purported exercise of those statutory powers. In the absence of necessary policy work regarding the implications of such changes, the Ministry is concerned that any amendments to the immunity clause in the *Workers Compensation Act* could have far-reaching and unintended

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consequences on other statutes. Creating such a fund could lead to a call for other similar funds to be created in other regimes. It could also lead judges to interpret the immunity clause in the *Workers Compensation Act* as providing no immunity where an adjudication decision is overturned. This could lead to similarly worded immunity clauses in other statutes being interpreted in the same way, leading to confusion, a significant weakening of Government's immunity clauses, and the need for the legislature to revisit not only the immunity clause in the *Workers Compensation Act*, but numerous immunity clauses in other statutes to ensure consistency and clarify the legislature's intention.

In addition, there are internal safeguards within the workers' compensation system. The *Workers Compensation Act* contains remedies to address errors made by the Board; those are: reconsideration by the Board, review by the Board's Review Division, appeal to the Workers' Compensation Appeal Tribunal (WCAT), and judicial review. Further, the Act established the Workers' Advisers Office to assist and represent workers in navigating the review and appeal systems. The Board's Fair Practices Office provides impartial assistance to any person or organization having an issue or complaint with the Board. Finally, the Board's board of directors is empowered to make policies to safeguard against mistakes such as those that occurred in the Worker's case. It is our understanding that the policy changes the Board made in response to your investigation are intended to prevent similar mistakes being repeated.

For all these reasons, the Ministry must reject your recommendation for legislative amendment. However, as discussed below in our conclusion, the Ministry will be considering what other steps it might take to prevent a tragedy like this one from happening again.

Recommendation #2: That the Ministry of Labour provide [the Worker] with an ex-gratia payment, in an amount to be determined by a retired judge, in recognition of the second accident resulting in the partial amputation of his hand which, according to your report, occurred due to the mistakes of WorkSafeBC in handling his initial claim.

As I indicated in my June 25, 2021 letter, the Ministry is unable to accept this recommendation. An *ex-gratia* payment in this circumstance would be contrary to the foundational principles of workers' compensation and the immunity clause as described above. Further, your recommendation would effectively have the Government acting as the insurer of an independent agency by providing an *ex-gratia* payment for actions that the government was not directly involved in and where the harm, according to your report, arose as a result of the actions of an independent agency. This is not the appropriate role of government in these circumstances and taking on this role would have government-wide implications. While it appears the Worker's case is a very sympathetic one, providing an *ex-gratia* payment based on how sympathetic a case is or on whether a complaint has been made to the Ombudsperson would be arbitrary and unfair.

Recommendation #3: The Ministry of Labour pay the reasonable legal expenses incurred by [the Worker] to make representation to the retired judge.

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For the same reasons the Ministry cannot accept the recommendation of an *ex-gratia* payment, the Ministry cannot accept this recommendation.

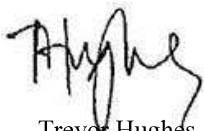
Conclusion

Your report highlights a critical area of the workers' compensation system and outlines some very important procedural improvements that the Board has made. Continuous improvement of the system is always a goal of the Ministry and the Board. We thank you for bringing these issues to our attention and moving forward we will consider what steps government might take to safeguard against future outcomes like the tragic outcome in this case, including issues of timeliness in decision-making.

We wish to reiterate that the Ministry of Labour is extremely sorry and disappointed about what happened to the Worker as a result of his workplace injury and his experience with the workers' compensation system. It is not acceptable for workers to suffer an injury caused by their work. But if and when that happens, workers must be treated with respect and dignity by the Board. The Ministry has engaged in a number of reviews since 2017 designed to improve the workers' compensation system and make it more worker-centric. It is the intention of the Ministry to reinforce this expectation with the Board at both the board of director level and the executive staff level to drive the importance of the need to ensure injured workers get the treatment they are entitled to in a timely and compassionate way, including in those situations where a worker's injury may have been aggravated or worsened by delays in treatment or by the treatment itself. To that end, the Ministry will be asking the Board to engage in a further review of the Worker's claim to see if there is anything further that can be done to address his circumstances and take further steps to avoid similar situations occurring in the future.

Thank you again for your report and the opportunity to respond.

Yours truly,



Trevor Hughes
Deputy Minister

pc: Ian Shaw
Head of Law and Policy
WorkSafeBC



OMBUDSPERSON

B R I T I S H C O L U M B I A