

# Appendix 2: Contextual Analysis and Overview of Best Practices in Disability Management of Work-Related Disability

## 1 INTRODUCTION

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Disability Management (DM) operates within a context of law, policy and practice determined by each jurisdiction. Its performance is mediated by the social, economic and demographic milieu within the state or province. Compensation systems that excel in DM are characterized by specific practices that facilitate early, safe, and durable return-to-work outcomes for injured workers. Local economic conditions and labor force demographics may also play a role in return-to-work outcomes. Other factors that can influence outcomes include financial incentives and disincentives enabled by law, policy and practice.

Data from the analysis of Washington State's workers' compensation system indicate a departure from outcomes noted in other jurisdictions for longer term temporary disability claims. Economic and demographic factors, legal entitlements, policy and practice may each play a role in accounting for this observed difference. One should consider how these contextual features influence the duration of disability in Washington.

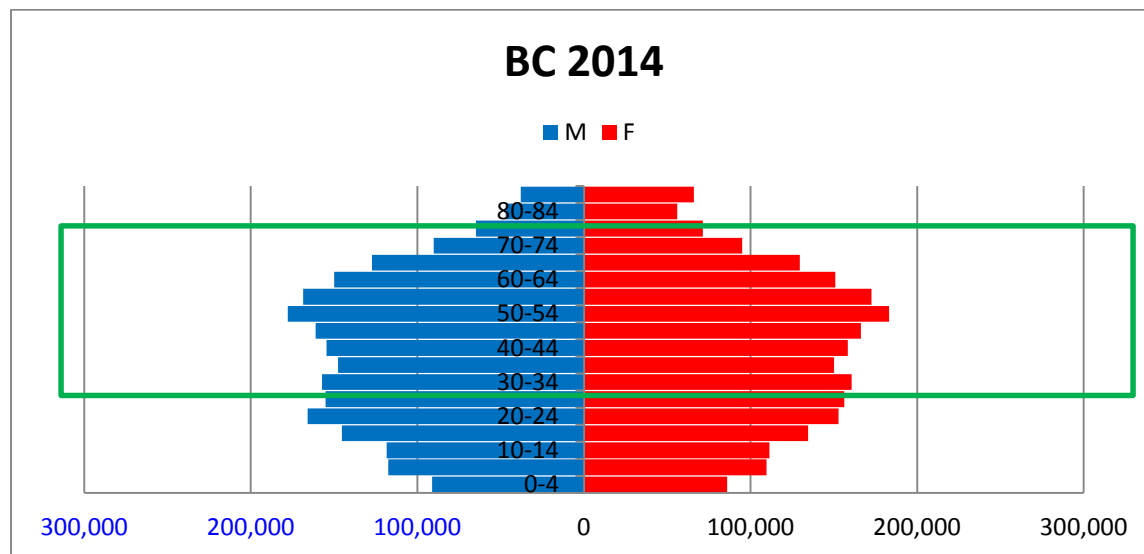
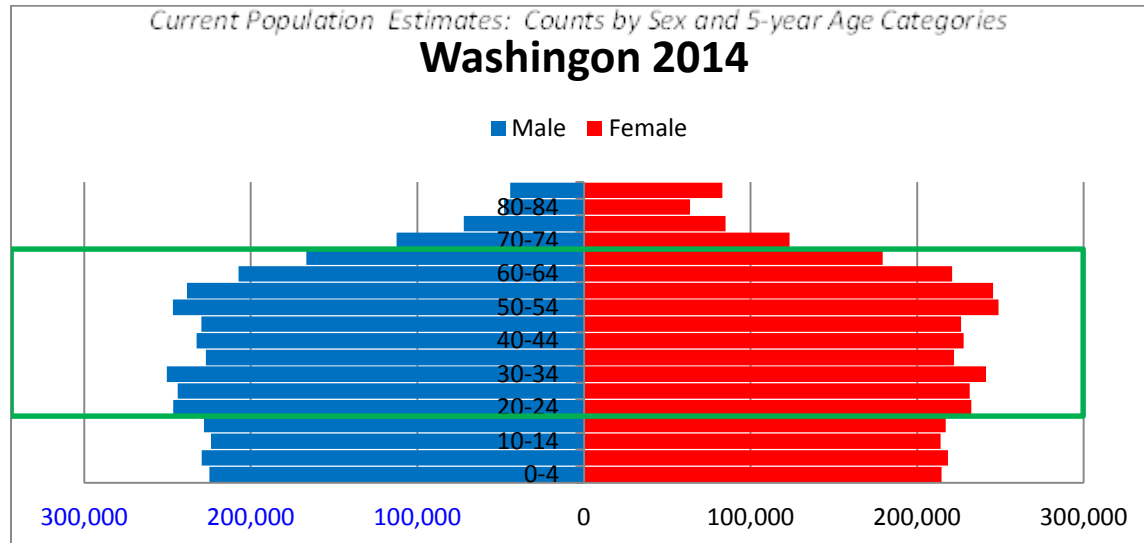
The purpose of this appendix is to establish the contextual similarities and differences between Washington State and two neighboring jurisdictions. If Washington's economic and demographic context is similar to its neighbours, factors influencing prolonged duration in Washington can justifiably be attributed to differences in law, policy and practice in the state. Finding that Washington had a significantly older demographic profile, or a relatively high unemployment profile, might explain why Washington experiences longer claim duration than its neighboring jurisdictions. In making these contextual comparisons we will not attempt to quantify exact causal relationships between the factors and disability duration. Rather, we will posit how each factor is logically related to greater or lesser disability.

Also examined in this appendix is a comparison of administrative structure, policy and practice of governing claims management in Washington compared with Oregon and British Columbia. Differences in claims management would help explain comparatively high or low disability durations in Washington. If Washington State is broadly similar in structure, law and policy, then the search for the root causes of the difference would best be focused on practice and the general execution of the workers' compensation program. A brief examination of the law and policy relative to neighboring jurisdictions reveals some differences that may contribute to the observed differences.

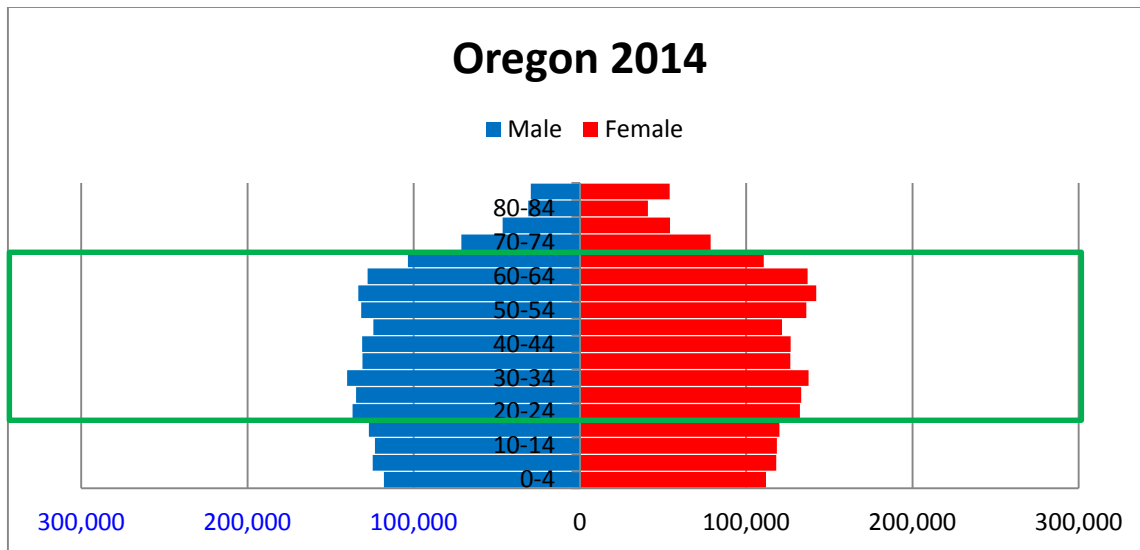
After establishing contextual similarities and differences, this appendix seeks to explore the characteristics of an effective DM approaches to the issue of longer duration claims. These comments are not based solely on analysis of current practice in Washington State, but on the basis of experiences from other jurisdictions that may have application to L&I given the observed differences and particular concerns regarding longer duration claims.

## 2 CONTEXTUAL ANALYSIS PART 1: DEMOGRAPHIC AND ECONOMIC ENVIRONMENT

### 2.1 DEMOGRAPHICS OF THE LABOR FORCE



Source: WorkComp Strategies



Source: WorkComp Strategies

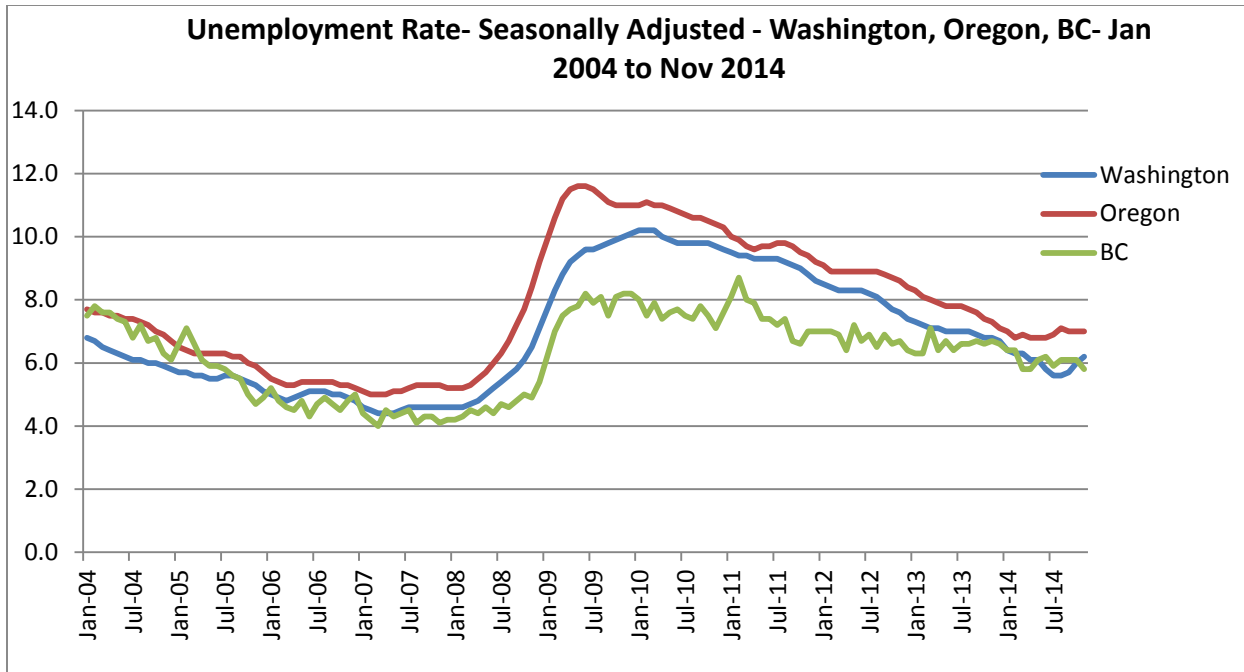
Age and gender are associated with different disability duration rates.<sup>1</sup> The demographic profiles of Washington, Oregon and British Columbia are broadly similar across the working age populations (boxed in green in the above population pyramids). (Source: US Census Bureau population projections and Statistics Canada data).

Workers' compensation does not operate on the whole population of working-age individuals but on the employed subset of that population. The participation rate is the number of labor force participants as a percentage of the population 15 years of age and over in Canada and 16 and over in the US. The BC participation rate is 63.6% as of November 2014 (Statistics Canada). Oregon has a participation rate of 61.4 percent in 2013 (State of Oregon Employment Department). Washington reports participation rates moderated during the recession and were at 65.6 in 2013 (Office of Financial Management 2014 Long-Term Economic and Labor Force Forecast). Thus, a relatively high percentage of the working age population are in the labor force.

Median age in Washington State was 37.4 (2013 Statista.com ) while both BC and Oregon had higher median ages at 41.9 (2011 Stats Canada) and 39.1 (2013 Statista.com). Age is positively correlated with duration of recovery from injury. Average household size in all three jurisdictions was 2.5 (2011 various sources). As noted, Washington, Oregon and British Columbia have similar demographic distributions for the working-age population. The population of persons age 19 and younger in Washington State is indicative of a higher youth dependency ratio. This may have implications for family size and dependent care issues for injured workers in the working-age population, particularly in justifying differential compensation rates

Labor force participation rates and economic conditions vary moderately among the three jurisdictions, but close similarities in the economic conditions are evident in indicators such as the Unemployment Rate.

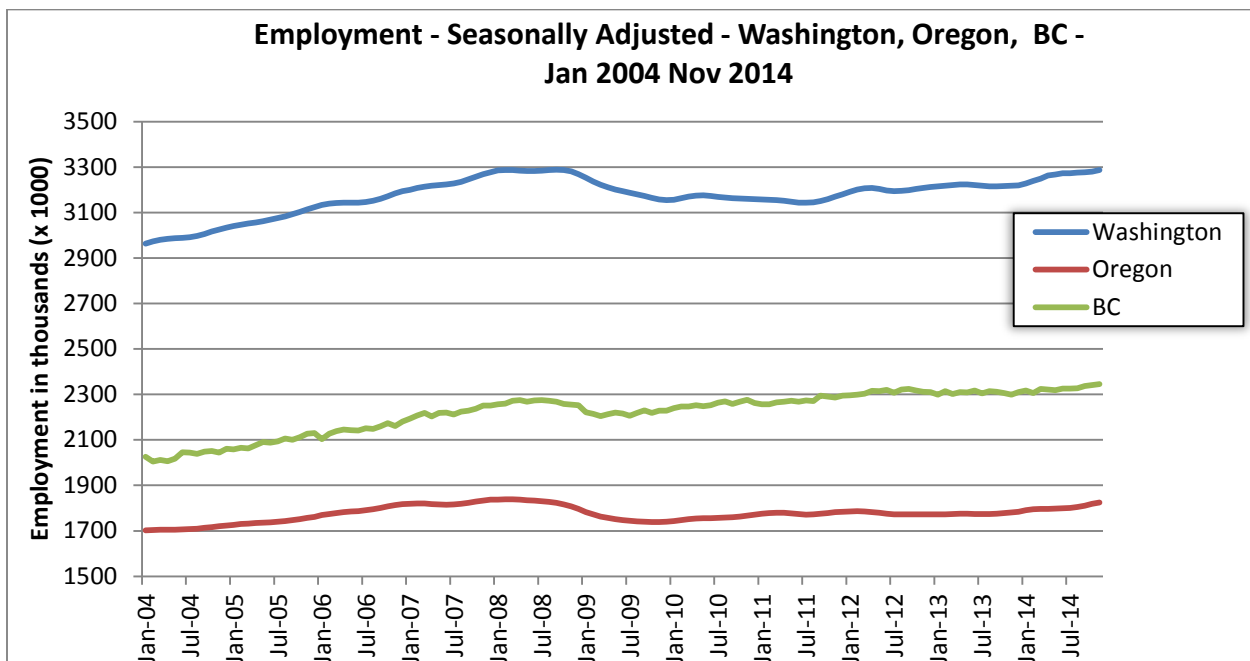
<sup>1</sup> For a general description of TTD duration differences see: Barry Lipton, John Robertson, and Katy Porter , Workers Compensation Temporary Total Disability Indemnity Benefit Duration—2013 Update, NCCI Research Brief, August 2013; for a statistical study of gender and age influences on TTD see: Frank Schmid, "Indemnity Benefit Duration, Maximum Weekly Benefits, and Claim Attributes," Casualty Actuarial Society E-Forum, , Winter 2011 Volume 2, available at: <http://www.casact.org/pubs/forum/11wforumpt2/schmid.pdf>.



Source: WorkComp Strategies

Although calculation methods differ (as evident in the “jagged” BC data line), the trends among these three jurisdictions are similar. The recession effects were felt earlier in Oregon and Washington than in BC and the magnitude of the recessionary impact on the US unemployment rates was more severe than in BC. By late 2014, however, the three jurisdictions had returned to unemployment rates prevalent in 2004.

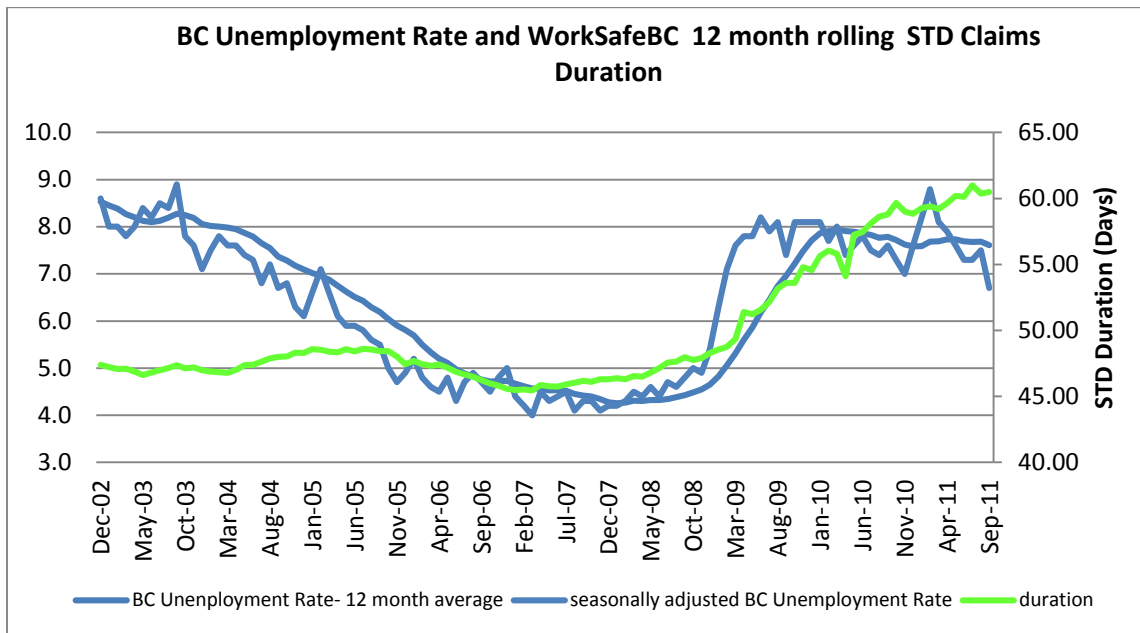
The recovery in terms of employment has been more rapid and vigorous in BC although Washington and Oregon have seen employment recover to near pre-recession levels.



Source: WorkComp Strategies

The above charts support the belief that the three jurisdictions have major demographic and economic conditions in common, as well as some differences. We do not detect any significant differences in these contextual factors that would explain why Washington State experiences a higher proportion of long-term disability cases.

The relationship between economic cycles and workers' compensation claims has been the subject of research.<sup>2</sup> Studies have also shown a high correlation between claim duration and rising unemployment. The BC example showed an increase in Claim Duration (days paid per claim) during the period of flattening and rising unemployment rates during the recent recession.



Source: WorkComp Strategies

The one-third increase in days paid per claim is significant. It is possible that the more severe impact of recession in Washington State may account for some of the longer-term claims' significantly longer duration but it is unlikely to account for all of that variation.

Employment and unemployment patterns in the three jurisdictions is broadly similar. Although direct comparisons are difficult because of definitional survey differences, the following table shows employment in each jurisdiction and the relative size (sorted on Washington data) of specific sectors in percentage terms.

<sup>2</sup> See for example: Institute for Work and Health, Issues Briefing [http://www.iwh.on.ca/system/files/documents/iwh\\_briefing\\_business\\_cycles\\_2009.pdf](http://www.iwh.on.ca/system/files/documents/iwh_briefing_business_cycles_2009.pdf).

BLS Data (preliminary, seasonally adjusted) in Thousands (000s)			Statistics Canada (Seasonally Adjusted) in Thousands (000s)	
Data Series	Nov	Nov	Nov	
	2014	2014	2014	
Labor Force Data	Oregon	Wash	BC	
Employment	1,825.1	3,287.0	2,346.0	Employment
Trade, Transportation, and Utilities	329.0	576.1	523.1	Trade, Transportation, Warehousing and Utilities
Government	298.1	551.9	114.6	Public Administration
Education & Health Services	254.8	449.8	457.6	Educational services, Health care and social assistance
Professional & Business Services	222.8	372.4	273.8	Professional, scientific, technical, business, building & other support services
Leisure & Hospitality	185.3	302.3	171.5	Accommodation and food services
Manufacturing	182.0	288.1	170.6	Manufacturing
Construction	75.8	161.3	192.2	Construction
Financial Activities	91.1	154.6	150.6	Finance, insurance, real estate and leasing
Other Services	62.5	114.5	103.2	Other Services
Information	32.9	110.0	116.3	Information, Culture and Recreation
Mining and Logging	8.0	6.4	50.0	Forestry, fishing, mining, quarrying, oil and gas
Percentage of Employment by Sector				
	Oregon	Wash	BC	
Employment	100%	100.0%	100.0%	Employment
Trade, Transportation, and Utilities	18.0%	17.5%	22.3%	Trade, Transportation, Warehousing and Utilities
Government	16.3%	16.8%	4.9%	Public Administration
Education & Health Services	14.0%	13.7%	19.5%	Educational services, Health care and social assistance
Professional & Business Services	12.2%	11.3%	11.7%	Professional, scientific, technical, business, building & other support services
Leisure & Hospitality	10.2%	9.2%	7.3%	Accommodation and food services
Manufacturing	10.0%	8.8%	7.3%	Manufacturing
Construction	4.2%	4.9%	8.2%	Construction
Financial Activities	5.0%	4.7%	6.4%	Finance, insurance, real estate and leasing
Other Services	3.4%	3.5%	4.4%	Other Services
Information	1.8%	3.3%	5.0%	Information, Culture and Recreation
Mining and Logging	0.4%	0.2%	2.1%	Forestry, fishing, mining, quarrying, oil and gas
<i>Employment accounted for by sectors noted</i>	95.5%	93.9%	99.0%	

If high-risk (frequency and severity) sectors were disproportionately dominant in terms of employment in Washington State, this might be a source of extended-duration claims. The relative similarity suggests, at least in the general magnitude of sectors, the three jurisdictions have a similar mix of employment by sector. BC has a lower percentage of government (public administration) but this may be a definitional difference.

The three jurisdictions examined have broad similarities that allow for general comparisons. Observed differences in temporary claim duration seem not to be attributable to demographic or economic conditions. Differences in coverage and application of workers' compensation law are more likely to account for some of the variation in claim duration.

### 3 CONTEXTUAL ANALYSIS PART 2: WORKERS' COMPENSATION LEGISLATIVE AND ADMINISTRATIVE ENVIRONMENT

Washington State and its west coast neighbors have similarities in workers' compensation law and its administration.

Item	Washington	Oregon	British Columbia
<b>Delivery of WC program</b>	Exclusive State Fund under Labor & Industries (Department under Executive Branch)	Competitive State Fund and Private Insurers (SAIF and Liberty NorthWest have 90% of market)	Exclusive Canadian Board operating as WorkSafeBC at arm's length from government as a "statutory agency"

<b>Item</b>	<b>Washington</b>	<b>Oregon</b>	<b>British Columbia</b>
<b>Association with OSHA function</b>	State OSHA within Labor & Industries	No direct association at the operational level	Integrated OH&S function within WorkSafeBC
<b>Self-insurance</b>	Permitted with self-administration	Permitted with self-administration	Limited to historically permitted and contracted (Deposit Class employers) but no self-administration. All claims are adjudicated by WorkSafeBC
<b>Income sources</b>	Employer-paid premiums and Worker-paid premiums based on hours worked	Employer-paid premiums based on payroll and Worker and Employer contributions to Worker Benefit Fund based on hours worked	Employer-paid premiums and deposits (costs plus administration fees) from self-insured
<b>Temporary Total Benefits</b>	60% of worker's pre-injury monthly wage (plus 5% if married or in a state registered domestic partnership on DOI; 2% per dependent for up to 5-max is 75%)	66 2/3% worker's pre-injury weekly wage	90% of net earnings (Essentially, "spendable" earnings: =.9*(Gross Earnings less (Fed Tax+ Prov Tax+Employment Insurance premiums + Canada Pension Plan[Social Security] contributions))
<b>Waiting Period</b>	3 days	3 days	0 (Temporary Disability Benefits payable from day following day of injury)
<b>Retroactive Period</b>	14 days	14 days	Not Applicable
<b>Taxable status of Compensation</b>	Not taxable	Not taxable	Not taxable
<b>Maximum Duration of Temporary Disability</b>	Duration of Temporary Disability	None	Duration of Temporary Disability
<b>Employer required by WC or other statute to reinstate injured worker</b>	No	Possibly under Home > 2013 ORS > Vol. 14 > Chapter 659A .043 (Unlawful Discrimination Against Injured Workers)	No
<b>Vocational Rehabilitation Assistance</b>	Limited- provided externally	Limited – provision through external providers registered with Dept. of C&BS WC Div. and through insurer-based Vocational Rehabilitation	Available to most long-term cases—provision primarily through internal Vocational Rehabilitation

Item	Washington	Oregon	British Columbia
		programs	Consultants
<b>Access to and typical length of retraining</b>	Restricted access but training up to the two-year cap is common	Restricted access.	Limited access based on disability and potential loss of earnings; emphasis on Training-on-the-Job and short-duration (13 week) courses.
<b>Transition to Permanent total Disability</b>	Temporary Disability continues until PD	Temporary Disability continues until PD	Income Continuity Benefits (not TD) may be paid and reimbursed from PD to termination of Temporary Disability
<b>Duration of Total Permanent Disability</b>	For life	For life	To age 65 or planned retirement or two years if after age 63
<b>Basis of Permanent Partial Disability</b>	Permanent partial disability benefits paid based on impairments listed in statute. Total permanent disability is based on incapacity from performing and obtaining gainful employment. Factors may include those personal to the worker, but unrelated to the work injury.	PPD based on scheduled impairments & work disability factors. Total permanent disability based on incapacity from regularly performing work at a gainful and suitable occupation. "Regularly performing" is the "ability of the worker to discharge the essential functions of the job," and "suitable" occupation is one that "the worker has the ability and the training or experience to perform, or an occupation that the worker is able to perform after rehabilitation." A "gainful" occupation is the lesser of (i) two-thirds of the worker's average weekly earnings; or (ii) federal poverty guidelines for a family of three. The worker is required to prove permanent and total disability, including that he/she made reasonable efforts to obtain employment. Benefits cease if there is RTW and post-injury earnings plus permanent and total benefit exceeds a worker's pre-injury wage	Functional Disability or, in exceptional cases, Loss of earnings (projected in the long run or deemed)



The general parameters of Washington State's workers' compensation statutes and arrangements are within the range of systems and statutes operating in its geographic area. Its structure as an exclusive state fund is similar to that of WorkSafeBC and the Canadian workers' compensation boards and commissions. Washington State and BC locate the lead agency for occupational health and safety with the lead agency for workers' compensation. Differences in insurance arrangements (exclusive state fund, competitive markets with state funds and private insurance markets) have not been associated with significant differences in claim duration or employer cost.

One key difference among the jurisdictions is the compensation rate for temporary disability. The compensation rate structure in Washington State is unique in its range from 60% to 75% of gross depending on the family composition of the claimant. This is very different from the 90% of net (spendable) income that applies in BC or the 66 2/3rds % that applies to temporary disability cases in Oregon.

Washington also differs from BC and Oregon in that it does not have a state (or provincial) income tax. The impact of this difference creates a gradient in the population of compensation recipients such that workers with larger families and earnings receive a greater percentage of spendable income while on compensation than compensation recipients in either BC or Oregon. Increasing compensation rates have been associated with increased claim duration Butler and Worrall<sup>3</sup>, but the scholarly literature on this subject is complex and often contradictory.<sup>4</sup> There are no data available on the breakdown of claimants by compensation rate structure or how the proportion of workers in each compensation rate category might differ between shorter and longer term claims.

The following table uses income levels from the Bureau of Labor Statistics (BLS) for May 2013 at the 10<sup>th</sup>, 25<sup>th</sup>, Median, and 75<sup>th</sup> percentiles for various taxation categories as they would have been on May 31, 2013. Deductions for single and married status were calculated by the freely available Paycheckcity.com online application. The compensation rate for single claimants at 60% and married claimants at 65% are shown and the percent of spendable income represented by that calculation is highlighted. Alternative compensation rates from other jurisdictions are also simulated.

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<sup>3</sup> Butler and Worrall, Claims Reporting and Risk Bearing Moral Hazard in Workers' Compensation, *Journal of Risk and Insurance*, 1991.

<sup>4</sup> See Ronald Ehrenburg, Workers' Compensation Wage and Risk of Injury (chapter 4) in John Burton, editor, *New Perspectives in Workers' Compensation*, 1988, found at: [https://books.google.com/books?id=HBmgSLMT55EC&pg=PA77&lpg=PA77&dq=workers+compensation+higher+benefits+increasing+duration+of+disability&source=bl&ots=NqqIzNwMo&sig=D\\_IKPL4U--kppg7T0m3d6iuQRCE&hl=en&sa=X&ei=DEA8VdDJJcayggT4tYCQBA&ved=0CDUQ6AEwAw#v=onepage&q=workers%20compensation%20higher%20benefits%20increasing%20duration%20of%20disability&f=false](https://books.google.com/books?id=HBmgSLMT55EC&pg=PA77&lpg=PA77&dq=workers+compensation+higher+benefits+increasing+duration+of+disability&source=bl&ots=NqqIzNwMo&sig=D_IKPL4U--kppg7T0m3d6iuQRCE&hl=en&sa=X&ei=DEA8VdDJJcayggT4tYCQBA&ved=0CDUQ6AEwAw#v=onepage&q=workers%20compensation%20higher%20benefits%20increasing%20duration%20of%20disability&f=false)

Washington								
OCC_CODE	OCC_TITLE	OCC_GROUP	TOT_EMP	A_PCT10	A_PCT25	A_MEDIAN	A_PCT75	A_PCT90
00-0000	All Occupa	total	2,827,200	20,550	26,920	40,910	66,120	97,080
<b>Single</b>								
	weekly			\$ 395.19	\$ 517.69	\$ 786.73	\$ 1,271.54	\$ 1,866.92
	Fed			\$ 44.35	\$ 62.73	\$ 107.81	\$ 229.01	\$ 381.92
	SS			\$ 24.50	\$ 32.10	\$ 48.78	\$ 78.84	\$ 115.75
	Med			\$ 5.73	\$ 7.51	\$ 11.10	\$ 18.44	\$ 27.07
	State			\$ -	\$ -	\$ -	\$ -	\$ -
	WC/IN/SDI			\$ 13.72	\$ 13.72	\$ 13.72	\$ 13.72	\$ 13.72
	Net/spendable			\$ 306.89	\$ 401.63	\$ 605.32	\$ 931.53	\$ 1,328.46
	60% gross			\$ 237.11	\$ 310.61	\$ 472.04	\$ 762.92	\$ 1,120.15
	66.67 gross			\$ 263.46	\$ 345.13	\$ 524.49	\$ 847.69	\$ 1,244.61
	80% Net			\$ 245.51	\$ 321.30	\$ 484.26	\$ 745.22	\$ 1,062.77
	90% Net			\$ 276.20	\$ 361.47	\$ 544.79	\$ 838.38	\$ 1,195.61
	60% gross/spendable			77%	77%	78%	82%	84%
	66.67% gross/spendable			86%	86%	87%	91%	94%
	75% gross/spendable			97%	97%	97%	102%	105%
<b>Married</b>								
	weekly			\$ 395.19	\$ 517.69	\$ 786.73	\$ 1,271.54	\$ 1,866.92
	Fed			\$ 23.56	\$ 32.65	\$ 76.90	\$ 149.63	\$ 270.24
	SS			\$ 24.50	\$ 32.10	\$ 48.78	\$ 78.84	\$ 115.75
	Med			\$ 5.73	\$ 7.51	\$ 11.41	\$ 18.44	\$ 27.07
	State			\$ -				\$ -
	WC			\$ 13.72	\$ 13.72	\$ 13.72	\$ 13.72	\$ 13.72
	Net/spendable			\$ 327.68	\$ 431.71	\$ 635.92	\$ 1,010.91	\$ 1,440.14
	65% Gross			\$ 256.87	\$ 336.50	\$ 511.37	\$ 826.50	\$ 1,213.50
	66.67 gross			\$ 263.46	\$ 345.13	\$ 524.49	\$ 847.69	\$ 1,244.61
	80% Net			\$ 262.14	\$ 345.37	\$ 508.74	\$ 808.73	\$ 1,152.11
	90% Net			\$ 294.91	\$ 388.54	\$ 572.33	\$ 909.82	\$ 1,296.13
	65% gross/Spendable			78%	78%	80%	82%	84%
	66.67% gross/spendable			80%	80%	82%	84%	86%
	75% gross/spendable			90%	90%	93%	94%	97%

Source: computations by Terry Bogyo for WorkComp Strategies

BC's compensation rate is 90% of Net (spendable earnings). By this comparison, certain compensation rate classes will have higher compensation in Washington State. Larger families with median to higher incomes will likely receive a greater percentage of spendable earnings than single status claimants and those with lower incomes.

Oregon’s compensation rate is 66 2/3rds percent of gross. Because of the state income tax, percentage of spendable income also varies. Using a similar methodology, the Oregon compensation rate as a percentage of spendable was calculated as follows:

OCC_CODE	OCC_TITLE	OCC_GROU	TOT_EMP	A_PCT10	A_PCT25	A_MEDIAN	A_PCT75
00-0000	All Occup:	total	1,640,300	19,500	24,020	35,850	55,980
<b>Single</b>							
	weekly			\$ 375.00	\$ 461.92	\$ 689.42	\$ 1,076.54
	Fed			\$ 41.32	\$ 54.36	\$ 88.49	\$ 180.26
	SS			\$ 23.25	\$ 28.64	\$ 42.74	\$ 66.75
	Med			\$ 5.44	\$ 6.70	\$ 10.00	\$ 15.61
	State			\$ 26.00	\$ 32.00	\$ 50.00	\$ 78.00
	WC			\$ 0.64	\$ 0.64	\$ 0.64	\$ 0.64
	Net/spendable			\$ 278.35	\$ 339.58	\$ 497.55	\$ 735.28
	66.67 gross			\$ 250.00	\$ 307.95	\$ 459.61	\$ 717.69
	80% Net			\$ 222.68	\$ 271.66	\$ 398.04	\$ 588.22
	90% Net			\$ 250.52	\$ 305.62	\$ 447.80	\$ 661.75
	66.67% gross/spendable			90%	91%	92%	98%
<b>Married</b>							
	weekly			\$ 375.00	\$ 461.92	\$ 689.42	\$ 1,076.54
	Fed			\$ 21.54	\$ 30.23	\$ 62.31	\$ 120.38
	SS			\$ 23.25	\$ 28.64	\$ 42.74	\$ 66.75
	Med			\$ 5.44	\$ 6.70	\$ 10.00	\$ 15.61
	State			\$ 27.00	\$ 34.00	\$ 52.00	\$ 78.00
	WC			\$ 0.64	\$ 0.64	\$ 0.64	\$ 0.64
	Net/spendable			\$ 297.13	\$ 361.71	\$ 521.73	\$ 795.16
	66.67 gross			\$ 250.00	\$ 307.95	\$ 459.61	\$ 717.69
	80% Net			\$ 237.70	\$ 289.37	\$ 417.38	\$ 636.13
	90% Net			\$ 267.42	\$ 325.54	\$ 469.56	\$ 715.64
	66.67% gross/spendable			84%	85%	88%	90%

Both Washington and Oregon have gradients in the calculated percentage of spendable earnings provided by the compensation rate. With the exception of some higher wage earners compensated at the 75% rate in Washington State, it is unlikely that differences in the rate of compensation among the three jurisdictions can account for the longer durations observed in Washington.

A central issue in the Washington system is the meaning of “employable.” The statute and case law create a hurdle for L&I to declare that disability has ended at MMI and a claim can be closed (after PPD payment if applicable). Below is the governing statute in Washington:

RCW 51.32.090(3)(a) provides in pertinent part as follows: “As soon as recovery is so complete that the present earning power of the worker, at any kind of work, is restored to that existing at the time of the occurrence of the injury, the payments shall cease.”

L&I has interpreted<sup>5</sup> this provision as follows:

<sup>5</sup> The excerpt was from the L&I Self-Insured Claims Adjudication Manual, pp. 52-53.

Once the payment of time-loss benefits has begun, the benefits must be continued until one of the following occurs:

- Released for Full Duty - When a worker is given a full release to the job of injury, time-loss benefits may be terminated. Note: If a worker is released for work on the same day they see their provider, time-loss is payable through the end of that day (i.e. worker has an appointment with their provider on January 17th, at the appointment the provider signs a release for work as of January 17th, the same day as their appointment, the worker is eligible for time-loss through the 17th).
- Found Employable – When a vocational assessment is conducted and a worker is determined to be employable, time-loss may be terminated after the determination of employability is made.
- Returns to Work – When a worker returns to work, they are not eligible for time-loss benefits. If the worker’s earning capacity has decreased as a result of the injury or occupational disease they may be entitled to loss of earning power benefits until claim closure.

Case law interpretations of this standard include the following:

A worker who has sustained a loss of earning power as the result of an industrial injury is entitled to loss of earning power compensation until the date on which the Department issues an order fixing the extent of his permanent partial disability. Thus, before temporary total or temporary partial disability compensation can be legally terminated on the basis that the worker's condition is fixed, the Department must first formally change the classification of the worker's disability from temporary to permanent. . . . Once the Department acted to classify [a] condition as fixed and permanent [as of a specific date] . . . loss of earning power compensation cannot be paid beyond that date.” In Re: Weston, Claim No. J-506937 (Dec. 30, 1987).

The legal context for considering issues of employability dictates how Case Managers (CMs) must process claims. The following is a synopsis of how a claims supervisor characterizes the duties of a CM:

If the doctor has not released the worker to the job of injury the CM has a responsibility to determine whether the worker can return to work before stopping time loss and closing the claim - it can be either the job of injury or a vocational evaluation to determine whether the worker has skills from prior employment that would make him/her able to work. If the injured worker is not rehired after injury (employer of injury or other) and if they do not have an unrestricted return to work from their doctor, then L&I must determine if they have “transferable job skills” that would enable them to find gainful employment.

This is a significant policy difference from most US states. Barth and Hunt in their 2010 report to L&I: “In many, if not most jurisdictions, MMI [Maximal Medical Improvement] alone is grounds for terminating temporary disability benefits.” That said, the majority of workers’ compensation cases return to work with their accident employers before MMI or a “medical plateau” is achieved. The determination of when MMI is reached is only significant in claims that have not returned to work before MMI is reached. The decision to terminate compensation then rests on the issue of “employability.”

It is a matter of some disagreement between employers and labor advocates in Washington State as to whether the way “employability” is assessed in Washington is fair and reasonable. Some feel that

identifying that the person can get a common job making minimum wage (e.g., fast food, retail, delivery, customer service) satisfies the test. Others feel that employability must take into consideration the personal limitations of the worker that may have pre-existed the injury, e.g., prison record, substance abuse, extensive tattoos/body piercing. Below is the position of the State Labor Council:

The problem is this: L&I adopted a standard in 1985 that defined "employability" or "able to work" as the ability to work at a job that pays at least the federal minimum wage. Since 1985, about 75,000 workers injured so severely that they could not return to their job of injury have been found "employable." Their benefits have been terminated and they have been left, in many cases, either unemployed or working at jobs with substantially less income than their wage at the time they were injured. They have received no vocational training, as they are ineligible once they are found "employable" at federal minimum wage. Workers who have spent years developing their skills are told they can be employed at a minimum wage job, regardless of what they were earning at the time they were injured. (State Labor Council, 2009, available as of Jan 2015 at <http://www.wslc.org/legix/workcomp.htm>)

A large WC law firm describes Washington law this way:

This assessment is the gateway to retraining services, and the door is just barely ajar. Because of what is commonly called the "employability standard," very few injured workers are provided the full benefit of vocational plan development and retraining services. If a worker is able to obtain and perform reasonable continuous gainful employment, paying at least minimum wage, they are "employable" and not eligible for further vocational services or retraining. This is a very low threshold for employability. An injured worker will only be found eligible for further vocational services if, in the sole discretion of the Director, vocational rehabilitation is both necessary and likely to enable the injured worker to become employable at gainful employment.

Source: Welch and Condon

BC traditionally has seen a little less than 5% of timeloss claims or about 3000 per year referred to Vocational Rehabilitation services (VRS) for assistance in return-to-work. Importantly, VRS is primarily an *internal* service of WorkSafeBC and referral may include counselling, an initial vocational assessment, and assistance in RTW. The referral generally takes place when it becomes clear RTW to the accident employer is unlikely. That determination is typically made no later than 12 weeks (3 months) and initial vocational assessments are typically completed within six months of the day of injury.

An internal referral using WorkSafeBC's Case Management System (CMS) workflow tools is quick. Cases are usually seen within days and, because VR consultants have levels of expenditure authority, they can commence the VR plan immediately without additional approvals. This provides a shortened time-frame from identification to implementation of a Vocational Rehabilitation Plan.

It is instructive to compare the BC legislation regarding temporary disability to that of Washington State. There are two sections in the BC *Workers Compensation Act* (WCA) that cover Temporary Disability. Here they are:

Temporary total disability

29 (1) Subject to sections 34 (1) and 35 (1), (4) and (5), if a temporary total disability results from a worker's injury, the Board must pay the worker compensation that is a periodic payment that equals 90% of the worker's average net earnings.

(2) The compensation awarded under this section must not be less than an amount equal to \$374.56 per week, unless the worker's average earnings are less than that sum per week, in which case the worker must receive compensation in an amount equal to the worker's average earnings.

#### Temporary partial disability

30 (1) Subject to sections 34 (1) and 35 (1), (4) and (5), if a temporary partial disability results from a worker's injury, the Board must pay the worker compensation that is a periodic payment that equals 90% of the difference between

(a) the worker's average net earnings before the injury, and

(b) whichever of the following amounts the Board considers better represents the worker's loss of earnings:

(i) the average net earnings that the worker is earning after the injury;

(ii) the average net earnings that the Board estimates the worker is capable of earning in a suitable occupation after the injury.

(2) Where temporary partial disability results from the injury, the minimum compensation awarded under this section must be calculated in the same manner as prescribed by section 29 (2) for temporary total disability but to the extent only of the partial disability.

Despite the legislative language differences, the determination of “employability in British Columbia has similarities to Washington State.” “Employability Assessments” can be requested for cases of temporary disability (Section 30 WCA) as well as for cases of permanent disability (Section 23(3) WCA). With respect to temporary disability cases the *Rehabilitation Services and Claims Manual Volume II* (RSCM II) in policy C11-89 states:

Documented objective evidence of what the worker is earning or is capable of earning is provided to the Board, who makes the decision on a worker’s entitlement under section 30.

In determining section 30 benefits, the employment opportunity or opportunities should be available immediately or within the period under review (two weeks, one month) and there should be some certainty that workers would have these opportunities open to them should they choose to apply.

With respect to permanent disability cases, the same policy goes on to state:

In exceptional cases, a worker's entitlement to a permanent partial disability award may be assessed under the method set out in section 23(3) of the Act. This method requires an employability assessment.

The goal is to identify suitable occupations, along with estimated earnings, that maximize the worker's long-term earning capacity up to the pre-injury wage rate. In most cases, "long-term" refers to three to five years.

The employability assessment process is conducted in light of all possible rehabilitation measures that may be of assistance and appropriate to the circumstances of each worker. The rehabilitation plan may form the basis for the employability assessment. A functional capacity evaluation may be used to assess the worker's capacity for work. This provides information on the worker's residual maximum functional capabilities, confirmation of identified alternative job options and plans for vocational reintegration.

Labour market data in conjunction with the objective functional capacity information is used to create a residual vocational profile. A list of suitable occupations based on the profile is then produced. Consideration is then given to whether these occupations are reasonably available.

Significantly, WorkSafeBC vocational rehabilitation practices focus on direct placement, training on the job and brief retraining (typically under 13 weeks, occasionally up to 26 weeks and infrequently longer) to achieve RTW. The employability assessment is typically based on the assumption that these programs will be effective and the termination of temporary disability compensation with the commencement of any permanent disability compensation can be made at that time. (See WorkSafeBC Practice Directive#C11-3.)

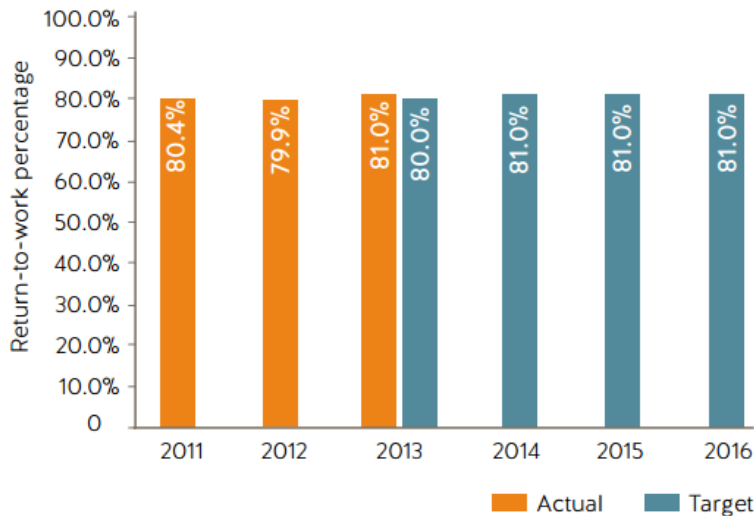
It should be noted that permanent partial disability awards based on loss of earnings are only granted in cases that are "so exceptional" as to make the typical "disability award" inadequate. BC is a "disability" rather than "impairment" jurisdiction so the degree or percentage of disability is presumed to compensate for the assumed loss of earnings associated with the functional loss. The determination of "so exceptional" has been controversial in BC but has substantially reduced the number of cases that receive compensation under a loss of earnings. Permanent total compensation as it would apply in other jurisdictions is limited to very severe functional impairment such as total blindness, bilateral amputations, and quadriplegia. These cases are considered 100% disabled and granted Permanent Disability of 100% (the equivalent of what Washington State would term Permanent Total Disability) even if they return to work. In cases where the impact of the disability is so exceptional as to make RTW unlikely in the long run as determined by an employability assessment, the worker may receive what amounts to permanent total disability. Such cases may include, for example, Post-traumatic Stress disorders where the physical functional impairment may be lesser than the impact on employability.

These practice differences are significant and may influence the "expected value" of certain outcomes in BC and Washington state. The lower incidence of "Permanent total" disability cases in BC infers greater success in ameliorating the impact of a loss of function and achieving RTW either directly or through short-term training.

Public performance measures on return to work outcomes are not available for Oregon or Washington but WorkSafeBC has published a key performance measure/indicator on this outcome. The measure reflects the effectiveness of the Disability Management interventions and differs from measure of duration that depend solely on claim status (such as "claimant off benefits" or "claim terminated" regardless of reason). Publication of performance measurements have been shown to improve accountability and result in changes. WorkSafeBC publishes past performance and future targets in its Annual Report and Service Plan (AR&SP). The following chart is from the 2013 edition.

## Key objective/performance indicator #2: Improve return-to-work outcomes

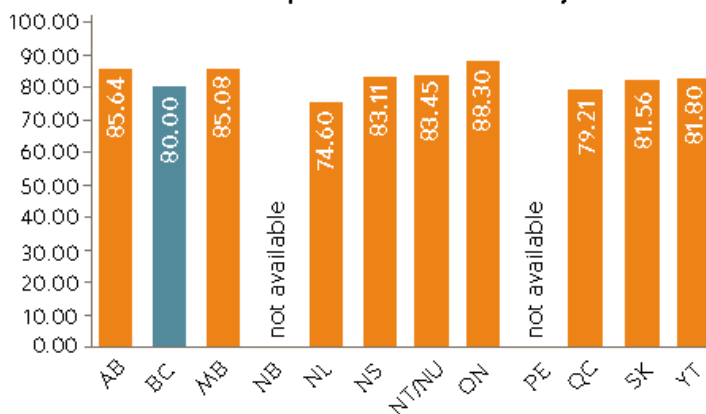
### Percentage of workers returning to work by 26 weeks\*



\* Prior-year results have been updated as a result of continuous data refresh. Current-year results are based on a refined calculation methodology. In 2012, we tracked successful return-to-work by 26 weeks as a percentage of concluded wage-loss claims within the calendar year. For 2013, we refined this metric to track the percentage of concluded wage-loss claims within the calendar year, plus current-year wage-loss claims open more than 26 weeks.<sup>28</sup>

Data are published in Canada for other jurisdictions using 120 calendar days as a measure.

### Percentage of wage-loss claims off compensation at 120 days



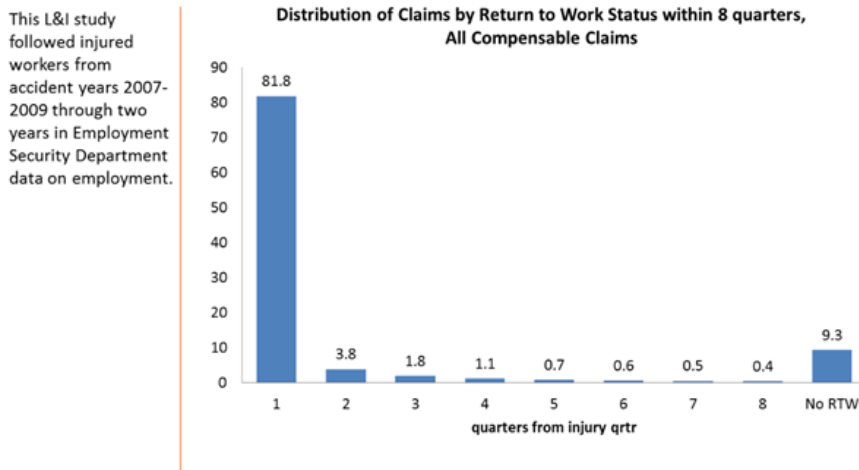
Source: AWCBC Key Statistical Measures 2012

<https://aoc.awcbc.org/KsmReporting/ReportReview/0?tempdatakey-ac996ebd-820e4ef4-ac3c-caadf1d3c960>



By the standard of these comparisons, Washington does a good job of getting the vast majority of injured workers back on the job quickly. Where the system departs from others is at the point where there are barriers to RTW particularly with the accident employer to the accident occupation.

## Most injured workers either return to work quickly or stay in the system a long-time



Source: Kirsta Glenn presentation to WCAC

For the “failures” of the RTW system in the short term, WorkSafeBC refers cases to Vocational Rehabilitation Services, an internal program. The goal is to take the cases that have not returned to work through the regular process and return them to employment.

The stated goal as published in the 2013 Annual Report and Service Plan is:

Improve return-to-work outcomes for workers in vocational rehabilitation (percentage of vocational rehabilitation clients who successfully return to work). The program receives approximately 3000 claims per year or about 5% of the claim volume. About 48% of cases return to work with new employers or enter self-employment with the assistance of the VR program.

Differences in the compensation for permanent disability are significant between BC and Washington. Previous work by Hunt, Harder, and others have highlighted these differences but it is important to note that both jurisdictions are faced with similar economic and workforce environments for these serious cases. One important difference is the introduction of an end date for permanent disability awards in BC. The “age 65” or planned retirement provision limits the size of the potential permanent disability award. This may have implications for the incentives that operate on the injured worker and may impact the effectiveness of disability management initiatives.

In Washington and BC compensation recipients receive an automatic cost of living increases. In BC, however, the rate is moderate and capped (cost of living= National CPI less 1% with a Cap of 4% and floor of 0%). As a result, some workers, particularly workers with little earning potential, receive from a

pension an income stream that exceeds or is comparable to their lifetime earning potential in Washington State.

Oregon appears to have some legislative requirements for the reinstatement of injured workers. Workers' compensation legislation in BC and Washington State do not contain specific requirements for mandatory reinstatement. Other legislation, collective agreements, and other regulations may, however, provide similar impetus for employers to accommodate injured workers. The *Americans with Disabilities Act* establishes obligations for covered employers to rehire injured workers with permanent disabilities.

All three jurisdictions can provide some rehabilitation services. WorkSafeBC appears to have the most direct involvement in the delivery of vocational rehabilitation services. Washington makes some use of state counselors, especially to facilitate early return to work. But all retraining plans would be written and implemented by private counselors.

Despite these differences, the statutory parameters of disability indemnification in the three jurisdictions are similar. A recent analysis of the temporary disability compensation recommendations of the 1972 National Commission on State Workmen's Compensation Laws found Oregon, Washington and BC to be in a group of states and provinces with the most compliance with the recommendations (Bogyo, *Does compliance with the National Commission's Temporary Disability Compensation Recommendations matter?*, [www.WorkersCompPerspectives.blogspot.com](http://www.WorkersCompPerspectives.blogspot.com), January 2015). This finding supports the general equivalency and therefore comparability of the compensation for temporary disability in these jurisdictions.

It is more likely that the root causes of the observed variation in long-term claim duration are a function of specific differences in the interpretation and application of law, policy and practice in the claims management of longer term claims than in the administrative structure of the insurance mechanism or the general level of compensation prescribed by statute.

## 4 DISABILITY MANAGEMENT: INITIATIVES THAT MAY ADDRESS LONGER DURATION CLAIMS

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The United Nations specialized agency, the *International Labour Organization* (ILO), defines "Disability Management" (DM) as:

A process in the workplace designed to facilitate the employment and reintegration of persons with a disability through a coordinated effort and taking into account individual needs, work environment, enterprise needs and legal responsibilities.

From the definition it is clear that DM is primarily a workplace issue. Disability Management fundamentals are focused on policies adopted by employers and the condition of the employer-employee relationship. Firms with fully developed DM programs in place have a complete range of programs, policies and services that support workers through the prevention of injury and disability, accommodation and support during recovery and active assistance in the return-to-work/stay-at-work stage. DM professionals such as certified Return-to-Work Coordinators are common in larger organizations. External resources used by successful firms include Certified Rehabilitation Counselor,

Certified Vocational Evaluation Specialist, Certified Work Adjustment Specialist, Certified Career Assessment Associate, Occupational Therapists and Vocational Rehabilitation Consultants.

Disability Management at the insurer level supports the DM fundamentals that should already be present in the organization's human resource policies. Disability and workers' compensation insurers may employ professionals such as Return-to-Work Nurse Advisors, Vocational Rehabilitation Consultants, Certified Rehabilitation Counselors and other internal and external resources to implement their DM programs.

Workers' compensation systems that integrate the DM model into their philosophy operate by providing, (among other things) the following:

- Setting expectations: Key messages relate to expected recovery paths and timelines, work as therapeutic, RTW as the usual and desired outcome [usually well before Maximal Medical Improvement].
- Ensuring [preferably direct but often indirect] three-point contact (worker, employer, treating physician)
- Supported contact between injured worker and accident employer: Often supported by specific legislation or rule concerning reinstatement following injury.
- Early identification and timely intervention: Key innovations involve use of data and predictive analytics to flag issues that indicate issues that may prevent RTW and the shortening of referral, review and approval stages of RTW and VR plans.
- Barrier identification and amelioration: Key innovations relate to regular and iterative identification of barriers and actions to overcome them.
- Early, safe and durable return to work support: Key innovations provide policy support of work as therapeutic. These include the use of graduated RTW, supernumerary and work-trial situations that are fully supported by wage-loss compensation equivalents or employer funding.
- Adoption [either explicitly or implicitly] of the ACOEM guidelines: Key innovations include adoption of the classification of absence from work as "Medically necessary", "Medically discretionary" and "Medically unnecessary".
- Providing special assistance to workers with co-morbidities or psycho-social overlays that restrict their employability.

Every jurisdiction selects strategies and initiatives to address the challenges specific to that jurisdiction. It is inappropriate to simply take a successful DM program from one jurisdiction and apply it to another with the expectation that it will deliver equivalent results. That said, the experiences of one jurisdiction may be an opportunity to examine the possible design and application of a similar program to address specific challenges.

One example of an effective program in the Oregon context is the "Preferred Worker" program. This program addresses a potential barrier to employment of an injured worker and provides an incentive to an employer to employ an injured worker. Washington has adopted and adapted this program. Oregon research and data support the effectiveness of this program. It is not clear that similar research and evaluation in WA has been carried out or that the impact of the program has been equally positive. In 2015 L&I proposed enhancements to the Preferred Worker Program, and as of April 2015 the Washington State Legislature approved the proposal. L&I reports that for the Stay at Work Program, actuarial estimates are that for every \$1 spent on the program, \$2.40 is saved in disability costs.

WorkSafeBC highlights the following programs and initiatives as being critical to achieving its targets for return to work (from 2012 and 2013 AR&SP):

- Providing dedicated return-to-work support for the construction sector — Under the Return-to-Work (RTW) to Construction program a construction RTW nurse contacts both the injured worker and employer to explore stay-at-work options upon registration, even before adjudication has taken place.
- Participation in industry groups — Made up of representatives from industry and WorkSafeBC, the Construction Claims Management Action committee is exploring and implementing innovative RTW programs for the construction industry. The committee’s goal is to improve the industry’s return-to-work outcomes.
- Facilitating RTW through dedicated teams embedded within health care — Teams work with authorities in the health care sector across B.C. to provide expertise and guidance in return-to-work practices and streamlined case management, facilitating earlier return to work.
- Delivering innovative RTW models — Return-to-Work Services was created to improve the customer experience and RTW outcomes for workers with musculoskeletal injury (MSI) claims. The team is staffed by nurses with clinical and return-to-work expertise. They have decision-making authority and ownership over claims related to MSI injuries. Since its establishment in 2012, RTW Services has achieved:
  - Faster return to work for those with MSI injuries, improving RTW by 1.7 days
  - \$2.2 million reduction in wage-loss equivalency payments
  - 20 percent reduction in the volume of claims directed to case managers
- Delivering a series of clinical programs — RTW Services has delivered a series of clinical programs, customized to more quickly meet the individual needs of workers. This has helped to further reduce wait times for claim processing.
- Expanding return-to-work services — The role of WorkSafeBC nurses was expanded to enable them to more effectively facilitate return to work for injured workers. WorkSafeBC nurses (now return-to-work specialists) became claim owners, and decision makers for select claims, applying early-intervention methodology. Early results have yielded positive program outcomes.
- Delivering clinical programs — A series of programs, customized to more quickly meet the individual needs of workers, continued helping reduce wait times for claim processing.

Washington State relies mainly on external providers with professional internal staff (Vocational Services Specialists) who consult with claims managers and monitor or approve vocational rehabilitation plans. In addition to private counselors, Washington uses state employees in its Early Return to Work Program, and, since 2008, has also added state counselors located in various WorkSource office locations in the regional offices. Oregon insurers may engage their own VR staff but there is an established provider community of registered private providers in the state. Setting expectations and monitoring performance is essential. Washington has instituted key performance indicators for private counselors and encourages CMs to choose counselors based on measured performance.

The delivery of vocational rehabilitation in BC is primarily by WorkSafeBC employees (Vocational Rehabilitation Consultants or VRC). Key to the success of this program is the authority levels for expenditures and approval of plans initiated by these employees. Most typical cases can be referred to a VRC, receive and initial vocational assessment and have a vocational rehabilitation plan developed and implemented without reference to a superior for approval (although all cases are subject to clinical supervision internally). This process eliminates wait times for approvals and reviews. This is critical to achieving timely delivery of services. More complex, expensive and extensive vocational rehabilitation

plans are subject to progressively higher levels of review and approval. This process tends to put the emphasis on shorter duration, job oriented interventions including on-the-job training, short skills-based training programs and facilitated work trials (with wage-loss equivalent support).

Ontario’s workers’ compensation insurer, WSIB, had a model similar to the Washington system between 1999 and 2009. The Labour Market Re-entry Program was delivered by private vocational rehabilitation providers subject to approvals and oversight by WSIB staff. Lengthy referral times and approval times were identified as barriers to the effectiveness of the program. Despite legislative requirements in Ontario for mandatory reinstatement, long-duration claims without accident employer accommodation were often referred to this program and eventually underwent long training programs that did not result in a high proportion of successful return to work outcomes. WSIB has decided to conclude that program and bring the professional expertise into the WSIB to better support employers in returning their injured workers and to improve the efficiency of provision of VR services to those who can’t.

Ontario has another feature in their plan that encourages accident employers to reinstate their injured workers. If an accident employer cannot provide an appropriate reinstatement, the cost of VR to provide the worker with an alternative is passed through as a surcharge to the accident employer.

A related no-fault compensation scheme is the Transport Accident Commission (TAC) in Victoria, Australia. It provides wage compensation on a no-fault basis to injury claimants from motor vehicle collisions. The TAC automated claims management system includes mandatory fields for client service representatives to specify at each contact the barriers to return-to-work and the actions being taken to overcome them. This is a unique innovation in Disability Management that may have application to other systems.

The conceptualization of impairment and disability has changed over time and this has had an impact on the way DM operates. The American College of Occupational & Environmental Medicine (ACOEM) published its guideline on work disability in its 2007 report *Preventing Needless Work Disability by Helping People Stay Employed*. That report contains the following table:

**TABLE 4**

When is a Disability Medically Required, Medically Discretionary, or Medically Unnecessary?

<b>Medically Required</b>	<b>Medically Discretionary</b>	<b>Medically Unnecessary</b>
Absence is medically required when: <ul style="list-style-type: none"> <li>● Attendance is required at a place of care (hospital, physician’s office, physical therapy)</li> <li>● Recovery (or quarantine) requires confinement to bed or home</li> <li>● Being in the workplace or traveling to work is medically contraindicated (poses a specific hazard to the public, coworkers, or to the worker personally, ie, risks damage to tissues or delays healing)</li> </ul>	Medically discretionary disability is time away from work at the discretion of a patient or employer that is: <ul style="list-style-type: none"> <li>● Associated with a diagnosable medical condition that may have created some functional impairment but left other functional abilities still intact.</li> <li>● Most commonly due to a patient’s or employer’s decision not to make the extra effort required to find a way for the patient to stay at work during illness or recovery</li> </ul>	Medically unnecessary disability occurs whenever a person stays away from work because of non-medical issues such as: <ul style="list-style-type: none"> <li>● The perception that a diagnosis alone (without demonstrable functional impairment) justifies work absence</li> <li>● Other problems that masquerade as medical issues, eg, job dissatisfaction, anger, fear, or other psychosocial factors</li> <li>● Poor information flow or inadequate communications</li> <li>● Administrative or procedural delay</li> </ul>

Source: Cornerstones of disability prevention and management. *ACOEM Practice Guidelines*, 2nd ed. pp 80–82.

This paradigm is actively promoted by ACOEM and Dr. Jennifer Christian in particular. The classification is consistent with the medical literature that supports work as good for health and wellbeing, early return to work as effective therapy, and accommodation as an alternative to total disability.

In the UK, the National Health Service has adopted documentation that is implicitly consistent with this framework. Based on Dame Carol Black's, *Working for a Healthier Tomorrow*, (2008) the system adopted documentation reports that require physicians to be specific about the medical need for absence. The old "sick note" has been replaced with new documentation called a "fit note." Early research following the April 2010 introduction of this program indicates it is working. One study by Shiels et al.<sup>6</sup> found:

- 1/3rd for mild to moderate mental health disorders
- 12% of patients had been given fit notes with a 'may be fit for work' assessment
- 22% of the individual fit notes issued were for a period of one week or less, 50% were for between one and four weeks, 24% for between one and three months and 4% for longer than three months
- The average length of a fit note episode was four weeks.

Disability management can be advanced by using skills and techniques shown to be successful in organizations worldwide. These can be internalized in a firm by given staff high level training in DM techniques. Other strategies such as the "Certificate of Recognition" (COR) program in place in some jurisdictions offer discounts and incentives on the premium side for organizations that implement and maintain certain prevention programs. Qualifying firms following independent audit receive reduced premiums. WorkSafeBC has a component of COR for "Injury Management and Return to Work". The program is currently under review while a new audit tool is created but the concept supports DM and follows a logic model that suggests costs associated with injuries will be lower in firms with effective RTW programs in place.

## 5 CONCLUSION

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The contextual analysis suggests that Washington State is similar to its immediate neighbors to the north and south. In demographic and economic terms, these three jurisdictions have similar workforce-age populations, have experienced similar patterns of unemployment and are or have returned to pre-recession levels of employment. The general proportions of employment by sector are also similar.

From a law and policy perspective, all three jurisdictions provide substantially similar levels of compensation for temporary disability. The unique compensation rate structure in Washington State maybe more complex than in BC or Oregon but for most categories of earners, the percentage of spendable, non-taxable income provided for by legislation is in the 80-90% range. A more detailed segmentation of long duration claims by income replacement rate may determine the extent to which this may contribute to the observations noted.

The similarities across the three jurisdictions support the appropriateness of comparisons. Performance measurement and comparative analysis may isolate help isolate the specific differences in law, policy and practice that may underlay the differences in outcomes.

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<sup>6</sup> Chris Shiels, Jim Hillage, Emma Pollard and Mark Gabbay, *An evaluation of the Statement of Fitness for Work (fit note): quantitative survey of fit notes*, Department of Work and Pensions (UK), June 2013, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/207526/841summ.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207526/841summ.pdf)

The observed pattern of long-duration claims requires greater analysis and action. The reasons for the observed difference in Washington State are not obviously based on a single clause within the statute or application of a specific policy or practice. Consequently, the solutions are unlikely to be found in a single change or set of legislative amendments. To address similar issues, other jurisdictions have implemented policies, programs and practices consistent with Disability Management to shorten duration, ameliorate the effects of impairments and achieve early, safe and durable return-to-work outcomes. These may provide Washington State a starting point for changes in practice, design of new progress and amendment to policy of law that would address both the human and financial cost of work-related injury, illness and disease.