Submission to the WCB Act Review

THE WORKERS COMPENSATION ACT

December, 2016

Manitoba Federation of Labour
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December 19, 2016

Manitoba Federation of Labour
Fairness For Everyone

Michael Weier
Chairperson
The WCA Legislative Review Committee 2016
PO Box 1296, Winnipeg Main PO
Winnipeg MB R3C 2Z1

Dear Mr. Weier:

The Manitoba Federation of Labour (MFL) is pleased to provide the following submission to the 2016/17 Review of *The Workers Compensation Act (The WCA)*. The MFL is the province's central labour body, representing over 100,000 unionized workers from the public and private sectors, and from workplaces as diverse as health and social services, manufacturing, retail, education, construction, natural resources, the arts and many others.

Every worker has the right to a safe and healthy workplace, and every family has the right to expect that their loved ones will return home safely at the end of each shift. When a worker is hurt on the job, they deserve fair workers compensation benefits and the right supports to help them recover quickly and get back to work safely.

For decades, the MFL has been a leading voice for workplace health and safety, and for fair compensation for injured workers. To support these priorities, we:

- Run active Health & Safety and Workers Compensation committees;
- Organize annual Health & Safety conferences, offering training on a variety of topics from a worker's perspective;
- Advocate and lobby for genuine prevention programming, stronger health and safety rules, and stricter enforcement to keep workers safe;
- Campaign against claim suppression and champion reform of WCB's rate model;
- Work closely with the MFL Occupational Health Centre and SAFE Workers of Tomorrow (SWOT) in promoting awareness of workers' health and safety rights and resources, especially among vulnerable workers; and
- Nominate representatives for the Minister's Advisory Council on Workplace Safety and Health, the WCB Board of Directors and the WCB Appeals Commission.

While there have been significant advances made both on the prevention side and the legislative/regulatory side of occupational health and safety over the last number of decades, there are still far too many cases of worker illness, injury and death on the job.

In 2015, for instance, almost 29,000 Manitobans were injured at work, and 19 workers died from occupational injuries or illnesses. These are sobering statistics, which compel us to redouble our efforts.

The last comprehensive review of *The WCA* was done in 2004/05, and many of its recommendations were incorporated into Bill 25[1], a significant modernization of *The WCA*, which was unanimously adopted by the Manitoba Legislature. Some of the many positive changes enacted as a result of the last review included:

- Removing a cap on insurable earnings;
- Maintaining the calculation of wage replacement benefits at 90% for the duration of a claim (eliminating the drop-down to 80% after two years);
- Eliminating age-based reductions to impairment awards;
- Expanding coverage to organizations using volunteers and work experience programs;

[1] Passed June 9, 2005; proclaimed in force January 1, 2006.

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- Allowing benefit levels to be topped-up above 90% (up to 100%) from other sources, including provisions negotiated as part of collective agreements;
- Strengthening prohibitions against claim suppression;
- Ensuring a minimum level of wage loss replacement benefits for low-income workers at no less than 100% of the Manitoba minimum wage; and
- Strengthening the onus on workplaces to support injured workers get back to work.

Subsequently to Bill 25, there have also been a series of other more targeted legislative amendments to *The WCA*. For example, Bill 65 formally established a consolidated arms-length prevention entity (SAFE Work Manitoba) and a prevention committee of the WCB Board of Directors[2]. It also broadened and clarified claim suppression offences, introduced a reverse onus for discriminatory action, increased maximum fines for compliance and permitted the WCB to inspect workplaces in conjunction with return to work[3]. A Canadian first, Bill 35 established PTSD presumptive coverage for all workers[4].

Despite these many improvements, the MFL still hears regularly from members about difficulties they face navigating the WCB system and accessing compensation services – challenges like:

- Confusion regarding detailed filing requirements and steps in the claims adjudication process;
- Employers who block injury reporting, or pressure injured workers to re-start their jobs without safe return to work plans;
- WCB decisions that are inconsistent with medical advice and inadequate processes to resolve differences in medical opinions;
- Invasive interference and unjustified appeals by third party 'claims management' firms seeking to minimize employer costs;
- Challenging hurdles faced by workers suffering from occupational illness in establishing the workplace roots of their disease; and
- Lack of understanding and double standards respecting compensability of psychological injuries.

Workplace injuries and illnesses are not things that any worker wants to endure, and the WCB system can be confusing and additionally frustrating for injured workers, despite the best efforts and strong commitment of WCB staff to support positive interactions, working within the current system.

The MFL appreciates the opportunity to comment about these and other issues and make recommendations for changes to *The WCA* and strengthening of policies and practices to improve Manitoba's workers compensation system.

In what follows, we address the specific questions/issues identified by the Minister in his Mandate Letter for the legislative review, as well as a number of other areas of concern to Manitoba workers.

In solidarity,

Kevin Rebeck
President
Manitoba Federation of Labour

[2] Included in Bill 65, proclaimed in force October 15, 2014.
[3] Included in Bill 65, proclaimed in force January 1, 2015.
[4] Bill 35, proclaimed in force January 1, 2016.

MFL Submission to the Review of the WCA

Issue 1: Experience Rating, Claim Suppression & the Meredith Principles

The Minister has specifically requested advice on the question of how *The WCA* aligns with the 'Meredith principles', which have provided the foundational underpinnings of modern-day workers compensation:

1) No fault compensation
2) Guaranteed benefits
3) Exclusive jurisdiction
4) Collective liability
5) Independent administration

Taken together, these principles provide the foundation for what has become known as the 'historic compromise' of workers compensation: workers relinquish their rights to sue an employer if they are hurt on the job, in exchange for no-fault, secure benefits for as long as they're needed, administered independently, and funded collectively by employers.

Regrettably, the adoption of experience rating into Manitoba's assessment model has pushed Manitoba's WCB system away from the Meredith principles, incenting claim suppression and aggressive return to work practices by employers. These practices hurt injured workers and deprive them of the supports that should be available to help them recover and return safely to meaningful work, thereby undermining the fairness, effectiveness and integrity of the system.

Experience rating creates a direct financial relationship between a given employer's claims experience record and that same employer's individual WCB premium costs. This individual responsibility, rather than collective responsibility, incents some employers to minimize their costs by reducing the number and duration of claims, rather than incenting the adoption of effective health and safety programs to protect workers from injuries and illnesses. Interference prevents workers from accessing benefits that should be guaranteed, and the focus becomes 'who's at fault', and how claims can be 'managed' to prevent premium increases.

For as long as experience rating has been in place, the MFL has been raising concerns about claim suppression and aggressive return to work practices. We receive frequent reports from members about claim suppression being perpetrated by employers in different ways:

- Discouraging or flat-out preventing injured workers from reporting injuries and filing WCB claims;
- Aggressively fighting and appealing many or all WCB claims made by injured workers, increasingly with the aid of paid third-party "claims management" consultants;
- Filing appeals as a means of gaining access a worker's medical information in a "fishing expedition" to try to find 'fault' or 'cause' to have the claim dismissed;
- Adopting and following policies that require management to appeal any claims over a prescribed value, irrespective of the circumstances;
- Establishing incentives (like financial bonuses, or workplace celebrations) for injured workers not to report injuries or file claims – these often involve group incentives, creating additional peer pressure not to report or file a claim;
- Punishing workers for reporting an injury and filing a claim (e.g. dismissal, re-assignment, shift changes, assignment to meaningless work);
- Pressuring workers to re-start their jobs before they're healthy enough to work, or failing to provide appropriate accommodations to make post-injury work safe and meaningful; and
- Pressuring workers to accept private insurance benefits, instead of filing a WCB claim, encroaching on what should be WCB's exclusive jurisdiction.

In the end, workers are left questioning the independence of a system (another core Meredith principle), which feels so tilted against them.

Problems with experience rating and the seriousness of claim suppression have been well documented in Manitoba. The MFL prepared a comprehensive report into the incidence of claim suppression and aggressive return to work practices in 2010. Following from this, the provincial government commissioned an independent external review of WCB's rate model in 2012/13 (Paul Petrie report), and from there, the WCB conducted an extensive consultation and commissioned a series of additional reports on the existing rate model (Morneau Shepell, Prism). Together, these investigations have produced a widespread formal recognition of the serious and systemic problem of claim suppression and overly aggressive return to work practices resulting from the financial incentives associated with experience rating.

In response to these findings, the WCB has elected to respond with a three-pronged approach, based largely on the Petrie report:

1. Making adjustments to the current rate model to "smooth" experience-based financial incentives and penalties, and thereby reduce (although not eliminate) financial incentives to suppress claims (i.e. making an employer's premiums less sensitive to their individual claims record);
2. Establishing a new 'safety certification' standard (*SAFE Work Certified*) to guide and support employers in adopting effective occupational health and safety programs that reduce injuries and illnesses (and claims); and
3. Creating a new 'prevention incentive' to financially reward the adoption of *SAFE Work Certified* health and safety programs (providing some counter-balance to the rate model incentive to suppress claims).

It bears repeating that it has always been labour's strong preference that experience rating be eliminated altogether, as the most direct way to address claims suppression. We favour a true collective liability, no fault and secure benefit system. However, we are cautiously hopeful that announced changes to the rate model, combined with a new safety certification standard and a prevention incentive will - taken together - have positive effects.

Recommendations:

- That the WCB/SAFE Work Manitoba step-up employer and worker education and public awareness around existing prohibitions against claim suppression and aggressive return to work practices;
- That penalties for claim suppression and aggressive return to work practices in *The WCA* be further strengthened and enforced more rigorously;
- That *The WCA* be amended to require public reporting on employers guilty of claim suppression and aggressive return to work activities;
- That *The WCA* be amended to require the development of formal safe return to work plans, developed jointly by worker, doctor and employer, to guide the safe re-start of work after an injury/illness.
- That the WCB ensure that the framework for the new 'certification standard' and 'prevention incentive' be based on established effective health and safety practices, and avoid any link to Behaviour Based Safety (BBS) programs or claims experience; and
- That the WCB commission a comprehensive independent investigation into claim suppression within two years of full implementation of the new rate model to determine whether rate model changes, safety certification and the new prevention incentive have had their desired effect of curbing claim suppression. If unsuccessful, then experience rating should be eliminated altogether.

Issue 2: Protection and Coverage

Workers compensation is a system that was designed to support all workers who are hurt or made sick at work and, at the same time, protect all employers from lawsuits related to workplace illnesses and injuries.

Unfortunately, not all workers in Manitoba are currently covered by *The WCA*. At only 75%, Manitoba has the third lowest coverage rate in the country. The last comprehensive review of *The WCA* in 2004/05 expressed concern about Manitoba's low coverage rate, noting that changes taking place within many industries and workplaces can result in workplaces previously thought to be relatively low-hazard becoming relatively high-hazard.

The WCA was subsequently changed from one which covers only those industries explicitly listed in regulation, to one that legislates mandatory coverage for all employers except those explicitly excluded by regulation. While certainly an improvement, the last review also recommended that coverage be extended (gradually over a multi-year period, and after consultation, starting with higher risk workplaces). We believe it's time to revisit and reactivate this recommendation.

As was noted a decade ago, industries and workplaces are ever-evolving, dynamic environments, with new risks and hazards developing all the time. It's important that all workers and all employers be afforded the protection of WCB insurance. Expanding coverage will also make the system more efficient, by increasing the base of employers to share costs, making the cost of WCB a true collective liability. Through economies of scale, we would expect to see lower average premium costs if coverage were expanded.

Mandatory coverage for all industries is also more consistent with the Meredith principle of exclusive jurisdiction.

Recommendation:

- That *The WCB Act* be amended to make coverage compulsory for all Manitoba workplaces.

Issue 3: Insurable Earnings / Assessable Payroll

The Minister has specifically requested consideration of "the establishment of a maximum ***assessable earnings*** level (or a cap) for workers" (emphasis added).

It's not entirely clear whether the Minister is referring to a cap on ***insurable earnings*** (how much of a worker's total earnings is insured and eligible for compensation at the current rate of 90%), or a cap on ***assessable payroll*** (how much of an employer's payroll is used for assessing WCB premiums).

Insurable Earnings:

In order to respect the principle that WCB benefits reflect earning capacity, all earnings (whether high or low) are assessable in Manitoba – there is no discrimination against higher-earning workers in the calculation of replacement income benefits. That is to say, whether you are a low-income or high-income earning worker, WCB benefits are calculated at a 90% replacement rate.

Prior to Bill 25, which was adopted unanimously by all members of the Manitoba Legislature in 2005, there had been a cap on assessable earnings, making it less feasible for higher income workers to file a claim when they were hurt or made sick at work.

Reinstituting a cap on assessable earnings would violate the principle that wage-loss replacement benefits should be based on earning capacity. In fact, *The WCA* not only recognizes this principle, but goes further in recognizing that in some instances, wage-loss replacement benefits should be based on potential future earnings capacity (e.g. there is provision in *The WCA* to consider higher future earning potential for an injured worker who is enrolled in an apprenticeship program at the time of his or her injury).

The last review of *The WCA* in 2004/05 recognized the inherent unfairness of capping assessable earnings – it recommended: "[s]o that a worker who experiences a workplace accident is fully-compensated for his or her lost earnings, the limit on insurable earnings should be removed."[5]

It should be noted that the Minister has more recently said on the question of insurable earnings: "[i]t's certainly not our intent to curtail any payments or reimbursements to injured workers. That's certainly not the intent."[6] The only way to ensure this intent is fulfilled is to maintain Manitoba's current practice of assessing all income in calculating wage-loss replacements benefits.

Assessable Payroll:

By policy, the WCB does maintain a cap on assessable payroll, currently set at $125,000.00. A cap on assessable payroll was deliberately maintained after the abolition of the cap on insurable earnings so as to 'smooth' changes for employers with higher earning employees.

It was estimated at the time that employers of this kind (with workers whose earnings exceeded the previous insurable earning cap) would pay higher premiums totaling, in the aggregate, up to $1 million. Actual experience has been in line with this projection. Less than 150 WCB claims were received last year from workers earning more than the current cap

[5] Working for Manitoba – Workers Compensation for the Twenty-First Century – Report of the Legislative Review Committee on *The Workers Compensation Act*, February, 2005, page 28.
[6] Honourable Cliff Cullen, Hansard, July 19, 2016 (page 12 of 19).

on assessable payroll, with a total wage loss cost of $840,000. It should be clearly understood that the employers in question, not the WCB system as a whole, absorb these costs.

The MFL has no strong opinion on whether or not a cap on assessable payroll should be maintained or for how long. We understand that it was the original intent of the Board to eliminate the cap over time, but in light of the current significant overhaul of the rate model, the Board has decided to maintain the cap for the time being, so as not to further confuse rate changes. This seems a reasonable position for the short term.

Recommendations:

- That all worker earnings remain insurable earnings, and that no discrimination be permitted against workers based on income level; and
- That the WCB Board of Directors continue to make determinations by policy on the question of an assessable payroll cap.

Issue 4: Strengthening Prevention Efforts

The Minister has specifically requested advice on the alignment of *The WCA* with the Minister's *Five-Year Plan for Workplace Injury and Illness Prevention*, released in April 2013, after broad consultation with the public and with worker and employer representatives. The plan committed government to the goal of "making Manitoba a nationally recognized health and safety leader".[7] It also prioritized:

- Providing meaningful incentives for employers who take genuine steps to improve health and safety and imposing tougher penalties on those who don't;
- Improving services where they're needed most – such as high hazard industries and workplaces that employ vulnerable workers; and
- Strengthening responsiveness via distinct dedicated resources for both prevention and enforcement.

The following year, Bill 65 came into force, formally establishing a consolidated arms-length prevention entity, SAFE Work Manitoba, as well as a prevention committee of the WCB Board of Directors – both positive steps. A lot of progress has been made on the prevention side of the health & safety equation, but much more remains to be done.

As noted above, SAFE Work Manitoba is currently in the process of developing a new workplace health and safety 'certification standard' (*SAFE Work Certified*), using Industry-Based Safety Programs as the delivery vehicle for health and safety services (training, consulting, program verification/auditing, etc.).

Labour has two fundamental concerns about this approach: (1) there is no formal worker representation on any of the existing Industry-Based Safety Associations (though we note favourably that worker experience and input has been established as an integral part of the auditing framework for *SAFE Work Certified*), and (2) there are only five industries presently represented by Industry-Based Safety Associations, and therefore eligible to seek certification and qualify for the new WCB prevention incentive. We note also that all five industries have heavily male-dominated workforces, and Safety Associations have not yet been established for female dominated workforces, including health care, where the injury rate has remained persistently high. As of 2015, only 22% of WCB covered employers had access to an Industry-Based Safety Program. SAFE Work Manitoba is targeting to grow that percentage to 60% by 2020, but even this target will leave a lot of workplaces unable to access a full range of health and safety services, including certification.

Recommendations:

- That SAFE Work Manitoba continue to promote workplace health and safety prevention through broad public awareness and marketing campaigns;
- That Manitoba complete implementation of the current *Five-Year Workplace Injury and Illness Prevention Plan*, and that *The WCA* be amended to require five-year plans (incorporating prevention, enforcement and legislative/regulatory framework);

[7] *Five-Year Plan for Workplace Injury and Illness Prevention (2013), Message from the Minister, page 3.*

- That SAFE Work Manitoba see through to completion the new *SAFE Work Certified* standard and prevention incentive initiatives, including a comprehensive evaluation component to assess their effectiveness;
    - Worker views and experience with health & safety should remain integral components of the standard
    - Employer incentives should be based on recognized health and safety programs, with no links to claims experience
- That SAFE Work Manitoba actively pursue expansion of the new SAFE Work Certified program into all sectors, with priority given to expansion into the health care sector, where government/regional health authorities are major employers and injury rates have been stubbornly high;
- That *The WCA* be amended to require SAFE Work Manitoba to support targeted prevention efforts for vulnerable workers – these should be advanced in partnership with existing community organizations;
- That the groundbreaking SAFE Workers of Tomorrow program be adequately resourced to expand their youth-focused workplace health and safety presentations and outreach to **ALL** high school students in the province.

Issue 5: Stress and Psychological Health

Throughout Canada there is growing concern about the detrimental effects of mental health and disability on our modern society. In response, the Canadian Senate initiated a comprehensive national study in 2006 to investigate mental health across Canada and the findings were sobering: it is estimated that 1 in 5 Canadians will experience some form of mental illness over the course of their lives. On any given week, approximately 500,000 Canadians will stay home from work due to a mental illness. Mental illness is already the leading cause of disability nationwide. By 2020, the World Health Organization estimates that depression will become the 2nd leading cause of disability globally.

The WCA currently treats physical and psychological injuries/illness very differently, which we believe is unfair, and may be unconstitutional. For example, occupational disease stemming from workplace stress is explicitly excluded from coverage, unless related to acute reaction to a traumatic event. As a result, there is no definition of workplace stressors that may cause psychological injury or illness.

This stands in sharp contrast to BC's WCA, which was amended to include an expanded definition of work related stress, following from the landmark *Plesner v. British Columbia Hydro and Power Authority* case, which struck down WorkSafeBC's narrow definition of a traumatic event. BC's WCA now recognizes: "A significant work-related stressor, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment." A BC worker can now claim compensation for a mental disorder if:

- The disorder is either a reaction to one or more traumatic events or caused by a single or series of significant workplace stressors;
- The condition is properly diagnosed by a licensed psychiatrist or psychologist;
- The condition is not caused by a decision related to the worker's usual employment.

In Manitoba, the combination of limited supports and treatment coverage for psychological injury/illness by Manitoba Health, persistently high levels of social stigma associated with mental illness, and discriminatory treatment under *The WCA* toward psychological illness/injury act together to create very challenging circumstance for workers suffering from mental health disorders.

The WCA should be amended to recognize and explicitly acknowledge that mental illness/injury can result from exposure to workplace hazards. A cross-jurisdictional review of the trends in workers compensation rulings reveals a dramatically different legal landscape since Manitoba's last review of *The WCA*. To date, these emerging legal precedents are redefining the definition for "traumatic injury" in at least one other provincial WCA. Research demonstrates that repetitive "workplace stressors" can directly cause or trigger both physical and psychological injuries in workers.

The 2013 CSA National Standard for Psychological Health & Safety in the Workplace describes thirteen such workplace psychosocial factors that employers have a high degree of control over. It is important to acknowledge that

the Standard is a practical, evidence-based tool that is well-suited to assist the WCB in determining whether employers have done their "due diligence" in addressing workers' concerns well in advance of filing a claim.

Recommendations:

- That *The WCA* be amended to treat physical and psychological injuries and illnesses in the same manner:
  - Remove current exemptions preventing coverage of stress-based psychological injury or illness; and
  - Add a clause that defines "workplace stressors" and expands compensation to cover diagnosed mental health disorders found to be caused by exposure to single or cumulative workplace stressors *(e.g. bullying/harassment)*.
- That the National Standard for Workplace Psychological Health and Safety be acknowledged in *The WCA* as a means to assess the presence of workplace stressors known to cause psychological illness/injury.

Issue 6: Discounting Medical Opinions in Injury and Illness Assessment, Recovery and Safe Return to Work

Over the last number of years, the MFL has been receiving more frequent reports and complaints from injured workers and from health care providers about how medical opinions are being discounted or ignored in determinations regarding their WCB claims. We're hearing about more and more cases where the WCB is making claims decisions that are at odds with the medical opinions of workers' own doctors or other health care providers. This is a very concerning trend.

While workers have the right under the current system to seek medical advice from health care providers of their choosing, it is also commonplace for the WCB to involve additional health care providers on contract with the Board to review and re-assess an injured worker's injury or illness claim. Quite often, this is done without an in-person medical examination, and strictly on the basis of a paper file review – also a concerning practice.

It is unclear why and under what circumstances the WCB elects to obtain advice from a second medical source of its own. If there is information missing from a worker's own doctor, the WCB should reach out to that doctor to fill-in any holes, rather than calling in a second opinion, especially without an in-person examination. Injured workers are left feeling that the WCB is looking for medical opinions that minimize claim costs, rather than focus on lasting recovery and safe return to work.

It is also unclear how the WCB makes claims decisions when faced with conflicting medical opinions from different sources. On what basis does the WCB concur with a doctor it contracts with directly, over a worker's own doctor?

Sometimes the point of contention centres on diagnosis – it is common for the WCB to insist that a worker's injury or illness stems from a pre-existing condition, when the worker's doctor diagnoses an occupational cause. Sometimes the disagreement relates to treatment/rehabilitation plans – e.g. the WCB refuses to approve ongoing prescribed therapy, citing lower "averages" for the type of injury in question. Other times, medical opinions on safe return to work plans are ignored – for example, a worker's doctor prescribes a series of work restrictions, easing over time as a worker recovers, but these are not respected by the employer or enforced by the WCB.

There are supposed to be processes in place to ensure that when a difference of medical opinion does occur, the physicians involved are notified and connected with one another with the aim of resolving any issues. However, these processes do not appear to be working, and consensus is not being reached in many cases, leaving workers confused and anxious about the best path forward to recovery and return to work.

Family doctors, specialists and other community health care providers are growing discouraged with the WCB system, when no explanation is provided as to why their advice is not accepted or followed.

We are concerned that when medical opinions are being discounted by the WCB, workers are being sent back to work prematurely and/or with insufficient attention being paid to safe restrictions or accommodations. There is no question that early, safe return to work is in the best interest of workers, employers and the WCB system as a whole, but 'safe' cannot be sacrificed in the interest of 'early'.

Recommendations:

- That the WCB adopts procedures to ensure that any needed information about a sick or injured worker's claim is obtained from his or her own health care provider;
    - WCB contracted health care providers should only be used at an injured worker's request or when community health care providers are not available (in which case, the worker should be notified immediately);
    - Any questions posed to a WCB contracted health care provider should also be posed to a worker's own doctor, and shared with the worker himself/herself.
- That the WCB develops clear guidelines for resolving any differences of medical opinions that might arise, so workers can be sure of the best path forward for recovery and safe return to work.
- That the WCB Appeal Commission be tasked with undertaking a review of the role and effectiveness of Medical Review Panels within the current WCB system; and
- That the WCB adopts the practice of having a sick or injured worker's safe return to work plan be developed jointly by the worker, his or her employer, and the worker's doctor. And where there is disagreement, there should be a quick and easy way to engage the WCB to intervene and build consensus before a worker resumes his or her activities.

Issue 7: Employer Advocate's Office / Worker Advisor Office

The Minister has specifically requested advice on a call from some employer representatives for the establishment of an 'Employer Advocate Office'. The MFL strongly opposes this proposal, as we believe it will contribute significantly to an adversarial process, and support even more elevated levels of claim suppression, particularly through the filing of illegitimate employer appeals.

Manitoba's WCB system is based on an inquiry model, which is intended to be non-adversarial. Workers are supposed to be entitled to guaranteed benefits, on a no-fault basis – it's the trade-off for giving up their right to sue employers for injuries and illnesses caused by work. The WCB is governed by a Board of Directors comprised of members appointed by government from nominations submitted by employer, labour and the public.

If employers need more information about filing requirements, billing or account details, availability of the new prevention incentive, or any other administrative matters, they should be able to access this information from existing WCB customer service.

But there is no justification consistent with the Meredith principles to provide resources to make it easier for employers to file appeals of workers' claims. Indeed, it is only because of the perverse incentives that go along with a rate model based on experience rating – which ties an individual employer's premiums to the claims record of his or her own individual employees - that so many employers are filing appeals, in an effort to minimize their individual premiums, and at the cost of denying workers what should be guaranteed, no fault benefits. This is a practice that should be shut-down, not encouraged and resourced.

Unless an employer has concrete evidence of employee fraud, there is no justified reason for employers to be filing appeals. More and more, however, employers are filing illegitimate and unfair appeals as a matter of common practice, in the hopes that even a small proportion of them will be accepted. Some employers file appeals in all or nearly all cases, or cases over a certain value benchmark, often with support of paid 'claims management' consultants. It is also not uncommon for employers or 'claims management' firms to signal an intent to appeal before an initial adjudication is completed. This represents a true perversion of the system, and constitutes unjustifiable harassment of employees and a crass form of claim suppression.

We note that the idea of an Employers' Advisor Office was considered by Saskatchewan in their most recent legislative review, and rejected on largely the same grounds outlined here (2014). Saskatchewan has opted instead for enhanced customer service for employers through the WCB. It is our understanding that Manitoba's WCB is currently moving on a similar track.

The need for a Worker Advisor Office (WAO), which already exists in Manitoba (although is currently under-staffed and under-resourced), stems from the fact that workers have far less power in the workplace than employers, and far fewer resources to navigate the complexities of the WCB system. As noted above, many workers face additional hurdles

and challenges to accessing WCB benefits as a result of claim suppression by employers. No worker wants to get hurt or sick at work, and when this happens, we need to ensure that workers are not prevented from accessing the benefits they're entitled to, due to lack of understanding about the claims process, or employer interference. The WAO is an important piece of the puzzle in supporting workers in this regard.

Recommendations:

- That the current Worker Advisor Office be maintained and better resourced to support workers with WCB matters, in recognition that workers have far less power in the workplace; and
- That an Employers' Advocate Office not be established, so as not to contribute to an adversarial system and heightened claim suppression activity.

Issue 8: Treatment of CPP Notional Contributions

Under current rules, when wage-loss benefits are calculated for a worker who is injured or made sick on the job, a deduction is made for his or her probable Canada Pension Plan (CPP) contribution. This deduction is purely notional, however, as the funds deducted are not actually remitted to the CPP on behalf of the sick or injured worker for the period when he or she is away from work (federal legislation does not permit remittance when a worker is receiving WCB benefits). This means the worker loses out on that portion of his or her pay that would normally be set-aside and invested in the CPP for use in retirement.

Ideally, federal legislation would be amended to avoid this situation and allow CPP contributions to continue when a sick or injured worker is receiving WCB wage-loss benefits. For workers suffering very serious injuries or illnesses that require long periods of recovery without work, long breaks in CPP contributions can have a very detrimental impact on future CPP retirement benefits.

However, in the absence of change to current federal rules, it is wrong to deduct funds, which a worker will never get back in retirement. This matter was considered by the last WCB Act Review, and the same conclusion was reached, but not implemented.

Workers should be encouraged to use notional CPP contribution amounts for their own personal investment retirement plans during the period when they are not entitled to contribute to CPP.

Recommendation:

- That *The WCA* be amended so that a worker's CPP contributions are not deducted in determining wage-loss benefits.

Issue 9: Dominant Cause

It is a well-established fact that occupational diseases are underreported by workers to the WCB. Underreporting is primarily the result of the many challenges workers face in proving that their disease is in fact workplace-based, challenges which are aggravated by long latency periods (workers may not experience symptoms for decades after exposure) and complications related to workers being exposed at potentially many different workplaces (and, sometimes, at different non-work locations as well) over the course of a worker's career.

WCB applies a very high burden of proof to prove occupational disease called "dominant cause" – that is to say, employment of the worker must be proved to be the dominant cause of disease in order for the disease to be compensable. For the above mentioned reasons, this can be very difficult to do.

Emerging science is starting to make the linkages between occupational exposure and disease clearer over time, but diffusion of new knowledge about workplace linkages is slow, and many workers with legitimate occupational diseases are falling through the cracks of our current system, going without compensation.

Recommendations:

- That 'dominant cause' be removed as the burden of proof for compensability of occupational disease, in favour of a 'balance of probabilities' test; and

- That an Occupational Disease Panel be established to research and set out a schedule of occupational diseases, make updates on an annual basis, and provide advice on the addition of presumptive coverage for exposure to high risk substances.

Issue 10: WCB Funding Model

The Minister has specifically requested advice on the WCB's existing funding model, and consideration of the Board's funded value as compared to other jurisdictions. The WCB's current funding ratio target is 130%, a reserve amount above what is needed to fully fund the workers compensation system in order to protect against risk. Most workers compensation systems across Canada also maintain a level well above 100% in order to provide some cushion. Recent WCB surpluses have pushed the WCB's actual reserve ratio above target, to approximately 143%. This has resulted in some employers calling for a review of the target, and use of excess reserves to significantly reduce assessment rates.

We believe it's very important for the WCB to have a target funding ratio well above the 100% in order to protect against market fluctuations and protect against the risk of unfunded liabilities. A prudent funding ratio also provides greater stability in assessment rates.

It is our understanding that the Board's better than expected performance has been largely driven by strong returns from its investment portfolio. We note also that over the last five years, the WCB's funding ratio has averaged around 132%, very close to target. During the 2008 financial markets collapse, it dropped all the way to 107%, which speaks to the need for prudent cushion of reserves.

We also note that the WCB has been lowering average assessment rates every year since 2014, including the most recent announcement of 12% reduction scheduled to take effect in 2017. Manitoba's assessment rate will now be second lowest in the country. In addition, we know that the WCB is intending on launching a new (multi-million dollar) 'prevention incentive' rebate program to support employers in reducing workplace illnesses and injuries. Prudent assessment rate reductions and the new prevention incentive are projected to bring the WCB's funding ratio back to 130% over the course of the next few years.

Recommendation:

- That current funded value targets be maintained, and no significant adjustments be made to assessment rates that could undermine the feasibility of the new 'prevention incentive' or expose the WCB to heightened risk.

Issue 11: Continuation of Health Benefits while on WCB Benefits

Through collective bargaining, many workers have achieved, as part of their overall compensation packages, additional health insurance benefits (e.g. dental, drug coverage, disability insurance, etc.). Some of these programs are paid for solely by employers, and others are paid jointly by employers and workers.

However, these benefits may not be available to workers when they're receiving WCB benefits and are most in need, as there is currently no requirement for employers to continue their premium contributions while a worker is off work due to illness or injury. In Ontario, WCB legislation mandates the continuation of premium payments by employers. There is provision in *The WCA* currently for the WCB to establish benefit programs for injured workers who have been receiving wage loss benefits for more than two years, but no protection exists for the majority of injured workers who receive WCB benefits for short periods of time.

Recommendation:

- That *The WCA* be amended to require employers to continue making contributions to employment benefit programs when workers are absent due to workplace injury or occupational disease for at least two years, and that the WCB provide a comprehensive benefit program for workers suffering from longer-term injuries.

Issue 12: Consideration of Probable Earning Capacity in Calculation of Wage Loss Benefits

Wage loss benefits are normally paid to an injured worker based on the earning capacity lost as a result of their compensable injury. However, *The WCA* also permits the WCB to increase the wage loss benefit rate of a worker who was "an apprentice in a trade or occupation" at the time of the injury. In such cases, recognizing that such programs generally increase a worker's earning potential, benefits would be based on the "probable earning capacity of the worker in the trade or occupation" [Subsection 45(3)].

Similarly, *The WCA* permits the WCB to increase wage loss benefits based on the average industrial wage, in situation where a worker's average earnings at the time of the injury, due solely to their age, does not fairly represent their earning capacity [Subsection 45(4)]. By policy, this age is presently set at 28 years old.

We support amendments to respect the future earning potential of all workers engaged in education and training upgrading at time of injury, regardless of type of program or age. Workers undertaking academic or vocational study are often employed in part-time or in lower wage jobs temporarily while attending university or college. When a workplace injury prevents an individual from completing their academic program, *The WCA* does not allow the WCB to recognize the increase in worker's earning capacity expected upon the completion of their academic or vocational program – unless the worker is an apprentice or a young worker. We believe this places undue restriction on the WCB's ability to recognize exceptional but legitimate circumstances when a worker's pre-accident average earnings do not fairly or adequately represent the earning capacity lost as a result of a compensable injury. Other jurisdictions, such as British Columbia and Ontario, have enacted legislation enabling their respective boards to increase a worker's wage loss benefits when there is evidence the loss of earning capacity incurred as a result of a compensable injury exceeds the actual pre-accident average earnings.

Recommendation:

- That *The WCA* be amended to allow the WCB, in the case of a worker suffering a compensable injury, to increase the compensation payable to a worker engaged in education or training to fairly represent what the worker would have otherwise been entitled to had he or she completed their education or training program.

Issue 13: Role of the Wider Medical Community in Establishing WCB Healthcare Guidelines and Policies

The WCB's policy on the Role of Healthcare Services identifies six activities the WCB's healthcare services department is responsible for, which includes advising the Board on healthcare matters relating to appeals, policy development, and healthcare trends. We note, however, that the WCB does not generally establish formal policies related to medical matters; instead, internal guidelines are adopted that are neither subject to consideration by the Board of Directors, open to debate with practitioners from the wider medical community, nor accessible to the general public.

We believe that adjudication and management of all workers' claims should be done under a consistent medical doctrine subject to direct oversight by the Board of Directors and based on consultation with the broader medical profession.

Recommendations:

- That *The WCA* be amended to establish a 'Medical Advisory Committee', to review and advise the Board on all medical matters relevant to the administration of *The WCA*, including adoption of guidelines and policies, to ensure they are consistent with current best practice and the generally held opinion of the medical profession.
- That as a matter of top priority, the Committee be charged with evaluating the WCB's approach to dealing with concussion injuries, as the Board's current approach appears to be significantly out of synch with treatment by the wider medical community.

Issue 14: Responsibility for Legal Expenses related to an Injured Worker's Committeeship in Cases of Mental and/or Physical incapacity

Regrettably, some workers suffer workplace injuries so severe that they become incapable of making personal, health or financial decisions on their own. In these cases, a committee can be appointed by the courts to manage the worker's affairs on his or her behalf. The committee may be a spouse, another family member, or the public trustee. The court requires that the committee periodically demonstrate that the worker's affairs are well managed. This process is complex and requires legal representation, which can involve costs that are burdensome on the finances of the worker. In the past, the WCB covered the legal expenses incurred by a worker as a direct consequence of their compensable injuries, but now maintains that it has no legislative authority to do so.

Recommendation:

- That *The WCA* be amended to enable the WCB to pay the legal expenses related to a committeeship, which is required by virtue of a worker's compensable injuries.

Issue 15: Provision of Medical Aid

The WCA currently provides that "the board may provide a worker with such medical aid as the board considers necessary *to cure and provide relief* from an injury resulting from an accident" (emphasis added) [Subsection 27(1)]. In our experience, the WCB generally approves medical aid less restrictively than the "double test" of providing relief and a cure. We are concerned, however, about the potential for a more strict interpretation, which has happened in the past and could happen in the future, resulting in a denial of medical aid benefits when it does not serve to both cure and provide relief of a worker's injury. For instance, in cases where there is no medical treatment that will cure a worker's injury, treatment modalities may be offered that reduce signs and symptoms of the injury, which in turn serves to increase functionality.

Recommendation:

- That Subsection 27(1) be amended to allow the WCB to provide a worker with such medical aid as the board considers necessary to diagnose, provide relief, enhance an injured worker's recovery to the greatest extent possible or cure an injury.

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