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Brief to the Workers Compensation Act Legislative Review

Canadian Centre for Policy Alternatives - Manitoba office

UNIFOR Local 567

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Brief to the Workers Compensation Act Legislative Review

As has been noted, 2016 marked the one-hundredth anniversary of the workers compensation system in Manitoba. The system replaced one under which injured workers were obliged to sue their employers for compensation for workplace injuries and illnesses. Worker success in such cases was limited by the court's acceptance of three employer defences (worker negligence, the negligence of a co-worker, and assumption of risk). By accepting these defences the courts ruled that 1) injuries caused by worker negligence would not be compensated, 2) injuries caused by the negligence of a co-worker would not be compensated, and 3) injuries arising from dangers generally associated with the job being done would not be compensated since the worker, by taking the job and the employer's wages, had willingly assumed the risk. The system was complicated by the fact that, by the beginning of twentieth century, juries began to ignore these rules and find on behalf of the worker. Employers would then take the case to an appeal court, where the judges were likely to either reverse the pro-worker decision or reduce the size of the award that had been recommended by the jury. The process for both workers and employers had become expensive, lengthy, uncertain, and increasingly unsatisfactory (Tucker 1990).

The system established in 1916 resolved many of these problems by adopting what are termed the Meredith principles, named for Ontario Justice William Meredith, whose 1913 Royal Commission report was the basis for the Ontario workers compensation system on which the Manitoba system was modelled. These principles are generally stated as being those of:

- No fault compensation;
- Security of benefits;
- Collective liability;
- Independent administration;
- Exclusive jurisdiction (Association of Workers Compensation Boards of Canada, n.d.).

It is worthwhile to note that Meredith did not list a set of principles: these have been developed by others on the basis of his report. Different authors have enunciated his principles in different ways. They are, for example, presented in the Preamble of the Manitoba Workers Compensation Act in the following manner (Points 'e' and 'f' are viewed as additional principles):

a) collective liability of employers for workplace injuries and diseases;

b) compensation for injured workers and their dependants, regardless of fault;

c) income replacement benefits based upon loss of earning capacity;

d) immunity of employers and workers from civil suits;

e) prevention of workplace injuries and diseases;

f) timely and safe return to health and work; and

g) independent administration by an arm's-length agency of government (Consolidated Statutes of Manitoba, The Workers Compensation Act).

The November 2016 discussion paper issued by the Workers Compensation Act Legislative Review Committee to serve as a basis for this review states that "It is critical that the Act be reviewed to ensure that it continues to reflect the system's founding principles," and asks "Can the Act be amended to better reflect the system's foundation principles in a modern context?" The paper then goes on to ask a series of additional questions: it could be said however, that all of those questions flow from this first question, "how can the Act reflect its founding principles?"

Two points need to be made at the outset. The key issue that Meredith was addressing was the failure of courts in providing compensation for the large number of workers who were being killed or maimed as a result of traumatic injuries occurring in newly established industries. The problem was not unique to Ontario, in 1906 the Winnipeg *Voice*, the newspaper of the local labour movement editorialized:

> The past week has been more than usually prolific of accidents, resulting in the maiming or killing of wage earners, while at their work. Fallings, crushing, cutting, strainings and breakings, the victims have followed one another into the hospitals in close procession in the cities and towns of the west. This fearful tribute which labor pays to capital is almost completely overlooked in the reckoning between them. We are producing spoils, culls, and derelicts at a rapid gait in the west, but the supply of labour is always sufficient to easily fill up the vacancies and all goes on as before. *The Voice, July 20, 1906.*

The second point is that in his report Meredith never enunciated the five specific principles that bear his name (see Meredith 1913). Other readers have extracted these principles, and while they are generally similar, they are as can be seen from a reading of the Manitoba Workers Compensation Act and the Association of Workers Compensation Boards of Canada, open to re-statement. It is impossible to determine the degree to which the current system is or is not consistent with Meredith's principles without reading his report. And when one does, it apparent that Meredith was recommending:

- **A system in which employers paid on collective basis.** Compensation for injuries, he wrote, "should be paid by the industries." Without a fund financed by contributions from all employers, workers, particularly those employed by small firms, had no security that they would be able to collect ongoing compensation, should, for example their employer go out of business. Meredith found the arguments in favour of a system of collective liability to be "unanswerable."
- **An non-adversarial system.** There was to be no determination as to whether the worker, a co-worker, or the employer was at fault. Workers would be compensated for work-related injuries. "As the price of the compensation he is to receive" the worker was to "surrender his right to damages under common law." In recommending that there be no appeal to the courts of

workers compensation decisions, Meredith warned against adopting provisions that would "allow a wealthy employer to harass an employee by compelling him to litigate his claim in a court of law."

- **Assured compensation for workplace injury (including illness).** Meredith recommended that payments continue "while the disability lasts."
- **Public administration of a public system.** Meredith wrote that he had faith that Crown appointees would perform "impartially and according to the best of their ability."

(This reworking of the Meredith principles draws on (and modifies) the work of Robert Storey.)

These principles are inter-related: if liability is not collective, but individual, individual employers will have an incentive to reduce the number of accidents that are reported and to seek to have claims rejected. This would make the system more adversarial and reduce the benefits to injured workers. If coverage is to be mandatory, and liability collective, then employers had a right to the most efficient and lowest cost insurance, which would be provided by a publicly administered, independent agency.

Meredith's report was not without its failings. Among these was the recommendation that workers in some industries (chiefly farming, retail and wholesale services, and domestic service) not be covered by workers compensation. If injured, these workers would still have to sue their employers, who in turn were to be denied the right to use the previously effective defences around assumption of risk and worker and co-worker negligence. Meredith had the courage to acknowledge that his position was indefensible, writing that "There is, I admit, no logical reason why, if any, all should not be included, but I greatly doubt whether the state of public opinion is such as to justify such a comprehensive scheme."

Does the Current System Reflect the Meredith Principles?

The current workers compensation system fails to reflect the underlying Meredith principles in a number of ways. Briefly stated, collective liability has been undermined, workers find their claims subject to increasingly adversarial challenges, and a significant portion of workplace injuries are not compensated. Finally, the system fails a basic test of logic. This paper will briefly address these points before presenting an overall policy alternative.

The Failure of Logic

As Meredith noted, there was no good reason for excluding any particular class of workers from coverage under the workers compensation system. The 1987 Report of the Manitoba Government's legislative review of The Workers Compensation Act recommended that the Act be amended to "provide for compulsory coverage, except in situations specifically excluded by Regulation" (Government of Manitoba 1987, 145). The British Columbia government took this step in 1993 when the British Columbia Workers Compensation Act was amended to include virtually all the industries, workers and employers in the province (Swarbrick 1995, 101–103). The Manitoba Act was amended in 2006 to extend to all workers except those excluded by regulation. Unfortunately, the regulations adopted were so broad that currently only 70 per cent of the Manitoba workforce is covered by workers compensation (Government of Manitoba "Invest in Manitoba," n.d.) Among the sectors excluded are accounting, banking, charities, collection agencies, domestic employment, legal services, teaching, and training. (Manitoba, Consolidated Regulation, 196/2005, Excluded Industries, Employers and Workers Regulation).

The End of Collective Liability

Collective liability was never total within the Canadian workers compensation system. From

the outset certain large industries, such as the railways or municipalities were allowed to insure themselves. These firms paid assessments that were based on their individual records. In some jurisdictions, this practice was extended to certain high-risk, resource industries, usually at the request of employer associations (Ison 1986, 728). For most employers collective liability was the rule: firms were grouped by industrial sector and charged an assessment based on the claims rate for that industry.

This changed dramatically in the 1980s, when employers began to press for wide-spread introduction of what has come to be referred to as experience rating. Under these systems, firms are awarded merits or demerits based on their individual workers compensation claims record. Based on this experience rating, their specific assessment varies from the standard rate for their sector. From the 1980s onwards experience rating became mandatory in most Canadian workers compensation systems (for example, in British Columbia in 1995, in Ontario in 1995 (Bruce and Atkins 1993, 548; Campolieti, Hyatt, and Tomason 2006, 122–123; Kralj 2000, 198). Manitoba expanded adopted mandatory experience rating in 1989 (Workers Compensation Board of Manitoba 2009, 13). In 2000, it adjusted its rate setting model, a move that reduced the rates for over 83 per cent of firms covered by WCB (Workers Compensation Board of Manitoba January 2001). In 2015 a new rate setting system was introduced in an effort to reduce the impact that annual shifts in compensation claims can have on the assessments charged to individual firms, particularly small firms (Canadian Occupational Safety 12 November 2015). It is not unlikely that in a few years, a different group of employers will lobby for yet more changes to address newly discovered unintended results.. The solution lies not in constant readjustment but a return to the "unanswerable' principle of collective responsibility.

The undermining of the principle of collective liability has contributed to a far greater problem: the introduction of conflict into what was to have been a non-adversarial process.

The Return of Conflict

The 1987 Manitoba legislative review of workers compensation recommended against introducing experience rating into the Manitoba workers compensation system. The report noted that

> Merit-rating plans do not, however, measure success in prevention of injury and disease; they measure the success in reducing claims costs. Aside from better health and safety promotion, there are ways of reducing claims costs, most of which have a negative effect on the workers' compensation system. For instance, we heard numerous instance of how attempts were made to suppress injury reporting, direct work injuries to private insurance cover, pressure workers to stay on the job when medical attention was clearly required, coerce workers back to work too soon, etc. — all this occurring in jurisdictions which had a merit-rating plan in effect. In other words, efforts tended toward reducing claims cost rather than reducing injuries. While some claims control is necessary in workers' compensation, too much leads to the adversarial system we are so much trying to avoid.

The report also noted that experience ratings systems were largely ineffective in predicting and responding to occupational diseases, which often take years to develop (Government of Manitoba 1987, 147). The significance of this failing will be made apparent in the next section of this report.

The Manitoba Workers Compensation Board reports that from 2000 to 2013 the timeloss injury rate fell from 5.6 injuries per 100 workers to 3.3 injuries per 100 workers. In many industries, the biggest decline came in 2001, coincident with the first year of experience rating (SAFE WORK Manitoba, no date, 4, 10). At first blush this suggests that experience rating works. To accept this argument is confuse claims data with injury data.

What the WCB is reporting is, in fact a decline in accepted claims per 100 workers. The actual impact of experience rating on injury rates is far less apparent. A 2007 review of research on experience rating concluded that it is difficult to draw strong conclusions about the effectiveness of experience rating (Tompa et al. 2007).

The problems predicted by the 1987 review committee have come to pass in Manitoba. According to a report prepared for the Manitoba Workers Compensation Board in 2011, the board investigation unit had identified the following ways in which employers suppressed or delayed the reporting of injuries:

- avoid reporting a claim and pay workers directly during their period of disablement;
- persuade workers to use sick time or vacation time instead of filing a claim;
- establish bonus programs based on injury free days that use peer pressure to inhibit claim reporting;
- discipline workers, force them to resign, or lay them off after they suffer an injury or illness;
- induce workers not to file a claim, or to abandon claims that have been filed;
- allow immigrant workers to not file a claim because they do not understand their rights and obligations under the Act.

The report also noted that "there has been no penalties or other effective deterrents applied to control and eliminate these activities. It is also clear that the Assessment Rate Model [experience rating] rewards employers who engage these activities" (Petrie 2013, 6–7.)

Critics also predicted that since small employers lack staff trained in administering workers compensation issues they would be less likely to make use of the appeals process by which employers can have worker claims denied (and thus reduce their compensation assessment) (Ison 1986, 735). The fact that the discussion paper for the current legislative review calls for the consideration of an Employer Advocate Office to assist small businesses in their dealings with WCB demonstrates that this warning has proven prescient. If created, it is likely that such an office would spend much of its energy in assisting employers in protesting and appealing worker claims. A return to a system of collective liability would render the introduction of such a costly office as an Employers Advocate unnecessary.

Experience rating has, as predicted, pitted workers against their employers. Rather than analyzing claims to determine how future injuries might be avoided, employers have an incentive to scrutinize claims to see they could be suppressed and appealed. The fact that employers can appeal WCB decisions has led to a situation that allows "a wealthy employer to harass an employee," although the harassment is through the claims and appeal process rather than the courts. The experience in either case, is equally gruelling and demeaning.

A Significant Portion of Workplace Injuries are Not Compensated

At first this may seem to be an extraordinary claim. Each year the Manitoba workers compensation system accepts over well over 25,000 claims (Workers Compensation Board of Manitoba 2016, 23). Thousands more, however, are not compensated. The problem arises from the issue of causation. Workers are compensated for injuries "arising out of, and in the course of, employment" and for occupational diseases. An occupational disease is defined as:

> a disease arising out of and in the course of employment and resulting from causes and conditions
>
> (a) peculiar to or characteristic of a particular trade or occupation;
>
> (b) peculiar to the particular employment; or
>
> (b.1) that trigger post-traumatic stress disorder;

TABLE 1 **Occupational Fatalities Accepted by Manitoba Workers Compensation**

Year	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Acute hazard	26	28	17	16	16	19	15	31	24	19	14	21	11	12
Occupational disease	12	17	9	19	9	19	16	12	13	19	14	12	30	17
Total	38	45	26	35	25	38	31	43	37	38	28	33	41	29

SOURCE: SAFE WORK Manitoba n.d., 16–17.

> but does not include
>
> (c) an ordinary disease of life; and
>
> (d) stress, other than an acute reaction to a traumatic event (The Workers Compensation Act, Definitions).

Section 4(4) of the Act further stipulates that an occupational disease will only be compensated if work is determined to be the "dominant cause of the occupational disease." In the case of firefighters, the Act presumes that certain diseases are work related unless proven otherwise.

Table 1 sets out the number workplace fatality claims accepted by the Manitoba Workers Compensation Board from 2000 to 2013, broken down by acute hazard deaths and occupational disease.

Over a 14-year period the system accepted 218 claims for compensation for death due to industrial illness. This works out to an average of 15.6 deaths from occupational disease a year. Fifty-eight per cent of these deaths were linked to exposure to asbestos (97 mesothelioma deaths and 29 asbestosis). "Other Cancer" accounted, for 23 per cent of the deaths, heart injury for 9 per cent, and "other disease" for 10 per cent (SAFE WORK Manitoba n.d., 16–17).

As a paper prepared by the Manitoba Section of the American Industrial Hygiene Association in 2015 makes clear, this represents a severe under-estimation of the true number of deaths arising from occupational disease in Manitoba in any one year. A more accurate picture, the AIHA paper suggests, can be gained by employing what is termed the 'attributable fraction' model. This approach employs epidemiological research to calculate the percentage of any illness ending in fatality that can be attributed to work (for a description of this model, see: Morrell et al. 1997). Using this model the AIHA estimates that the number of deaths due to work-related diseases in Manitoba in 2013 was not 17, but 415 (approximately 210 of these would be due to cancer). In other words, it is likely that the current system is providing compensation for less than five per cent of Manitoba deaths due to work-related illness (American Industrial Hygiene Association (Manitoba Section) 2015). The number would climb much higher if it were to include non-fatal industrial diseases. For example, to a quarter of back pain cases among working-age Canadians may be work related (Liira et al. 1996).

What are the reasons for this failure?

In the first place, many workers are unlikely to even file a claim for compensation due to occupational disease because:

- the worker's physician may not be aware of the link between the worker's illness and the disease;
- the worker's physician may not inquire into the worker's work history (a step necessary to determine what the hazards the worker had been exposed to and to identify the potential links between work and the diagnosed illness);
- the worker may not be aware of various hazards associated with her or his work history and therefore may not inform the physician of these exposures. This is

particularly significant since many diseases arise from more than a single cause. A disease may well result from exposure to a series of contaminants over the course of a person's lifetime;

- the research that would link a specific chemical and specific illness may not have yet been undertaken. Or, as was the case with asbestos for many years, an industry association may be successfully disputing the link between its product and illness (Brodeur 1985).

Physicians historically have received little training in the links between work and illness (Landrigan and Baker 1991; Lax 1996). Not surprisingly, as a 2005 report in the *American Journal of Industrial Medicine* concluded a "significant proportion of diseases attended in primary setting was not recognized, and they were hence not reflected in official statistics" (Benavides et al., 2005, 176).

When a ladder collapses and worker falls and breaks an arm, it is clear that the injury arose "out of, and in the course of, employment." As noted above, workers compensation was created to address just this sort of injury and does a relatively effective job of compensating these injuries. But our understanding of injury has broadened considerably in the past century. Today it is clear that:

- a significant number of injuries and diseases have multiple causes;
- it is not always possible to identify all these causes or apportion their weight in the development of the illness or injury;
- work plays a significant role in determining health.

The links between work and health extend to the way that work is organized: workers in high productivity jobs that allow little in way of workplace variation (food-processing workers for example) are at greater risk of cardiovascular disease. Stress and ill health are more likely, other words, to be found about the bossed than the bosses. (Karasek and Theorell, 1990) Shift work has also been associated with elevated levels of cardio-vascular illness (Vyas et al., 2012).

As can be seen from the above many workers with occupational diseases are likely to be unaware of the link between work and their illness and therefore, they will not file a claim. If they do so they must not only demonstrate the link between work and their illness, but demonstrate that work was the "dominant" cause of the illness. Pursuing this claim could well have a negative psychological effect on the injured worker. It will also engage the time of numerous individuals: employer representatives who may wish to appeal the case, physicians (representing the worker, the employer, and the Workers Compensation Board), compensation board staff, and appeal commission staff. Their task will be draw a line between an injury that results from work and one that does not: That line, it needs to be recognized, is capricious and arbitrary in nature. The time to erase it, and establish a universal disability compensation system is long overdue.

A Universal Disability System

Currently disabled Manitobans may be eligible for support from (the following list is not exhaustive):

- Workers Compensation;
- The Canada Pension Plan;
- Employment Insurance;
- Employer benefit plans;
- Privately purchased insurance;
- Manitoba Public Insurance;
- Compensation for the victims of crime;
- Social assistance;
- A court-ordered award following a law suit.

Each of these systems has its own decision-making processes, rules, and benefit levels. There are gaps and overlaps. The programs are poorly integrated, and much of the integration that does exist is focused on monitoring for duplications in payment from multiple funds to a specific individual (Cwitko 1995, 5). The type of benefits a person would receive for the same disability varies depending on the circumstances of the injury. One can sustain a permanent disability from slipping and falling on the public side walk, one's own sidewalk, one's neighbour's sidewalk, the grocer's parking lot, or the employer's parking lot. In each case, the injury and subsequent needs would be identical, but the compensation and rehabilitation services available to you would vary widely. This is a lottery, not a public health policy.

There is a need for a universal disability compensation program that had as its focus the needs of the disabled individual and is not concerned with determining the cause of the disability. Such a program would cover all Manitobans with disabilities. It should be:

- Non-adversarial. Individuals would not have to sue for compensation, nor would they have to establish the cause of their disability. There would be no recourse to the courts;
- Guarantee compensation based on the concept of income replacement;
- Fund liability collectively. Funding would come from general revenues; employers (possibly based on hazards associated with specific industrial sectors), and levies on hazardous activities;
- Be publicly administered.

A comprehensive disability insurance plan is not an idle concept. Over the past 40 years the governments of New Zealand and the Netherlands have brought in universal accident and disability insurance programs. (For a summary of the New Zealand system, see: Todd 2011) The case for such a system in the Canadian context was had made fully and clearly by Terence Ison, the former head of the British Columbia Workers Compensation Board over 20 years ago (Ison 1994).

An academic article published in 2000 outlined the benefits of a universal approach, but concluded that since the establishment of such a system would require "the exertion of political will and cooperation among all levels of government and among fragmented stakeholder groups... this approach is not likely to be politically feasible in the near future" (Shainblum, Sullivan, and Frank 2000). This is the counsel of despair. Sixteen years later, the problems that universal disability insurance could help resolve are still with us. The Manitoba government cannot institute a national disability program on its own: but it can support its creation. And more importantly it can initiate reforms that will serve as a precursor for such a program.

It can do so by considering the suggestions of another visionary judge, this one, a Manitoban. Robert Kopstein had first-hand knowledge of physical disability: as a youth he spent a week in a coma after being hit by a streetcar. He also contracted and survived poliomyelitis. As a young lawyer he helped draft the regulations governing Manitoba's public automobile insurance plan and later served as the chair of the Manitoba Workers Compensation Board (*Winnipeg Free Press* 8 March 2014). It was in his final report in that capacity that he called for an expansion of workers compensation to "eliminate the need, the cost and the anguish of having to prove that an injury or disease which results in disability was work-related." He proposed that workers compensation coverage:

1) be expanded to all provincially regulated workplaces;
2) be provided on a 24-hour a day, seven day a week basis to all to all individuals covered by workers compensation.

He proposed that the level of benefit be funded by a premium paid by all workers. This would provide all Manitoba workers with disability compensation for a fraction of the price they would pay for it in the private insurance market (Workers Compensation Board of Manitoba, 1991, 1–2).

Some might still argue that a small province such as Manitoba cannot afford to lead the way on this issue. The most telling refutation of that argument can be found in the Meredith Report itself, when Justice Meredith responded to just this argument by stating "The question, in my opinion, is not what other countries have done, but what does justice demand should be done" (Meredith, 1913). That, it should be noted, is the true Meredith Principle, and the one against which all other policies and practices should be measured.

Recommendations:

- All provincially regulated workplaces be covered by workers compensation;
- The Workers Compensation Act should prohibit experience rating;
- Manitoba's Five-Year Plant for Workplace Injury and Illness Prevention should be amended to directly address the central role that the organization of work has on health;
- As the first step to the creation of a national universal disability compensation system, Manitoba provide Worker Compensation coverage on a 24-hour a day, seven day a week basis to all to all individuals covered by workers compensation.

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